TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. [redacted]51.

CHARLES T. CHERRY, RECEIVER OF THE CAPITOL NATIONAL BANK OF GUTHRIE, OKLAHOMA TERRITORY, PLAINTIFF IN ERROR,

vs.

THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED JUNE 11, 1906.

(20,284.)

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a Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1905, of said Court, begun and held at the United States Court House in the City of St. Louis, Missouri, on the first Monday in December, to-wit: the fourth day of December, A. D. 1905, before the Honorable Walter H. Sanborn, Honorable William C. Hook and Honorable Elmer B. Adams, Circuit Judges.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the eighteenth day of July, A. D. 1905, a transcript of record, pursuant to a writ of error directed to the Circuit Court of the United States for the Western District of Missouri, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein J. A. Willoughby, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, was Plaintiff in Error, and The City National Bank of Kansas City, Missouri, was Defendant in Error, which said transcript of record is in the words and figures following, to-wit:

1 UNITED STATES OF AMERICA, *sct:*

To the City National Bank of Kansas City, Missouri, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States for the Western Division of the Western District of Missouri, wherein J. A. Willoughby, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, [—] plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Smith McPherson, Judge of the Circuit Court of the United States for the Western Division of the Western District of Missouri, this 2nd day of June, in the year of our Lord one thousand nine hundred and five.

SMITH McPHERSON, *Judge.*

UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, sct:

We hereby acknowledge due service of the within Citation this second day of June, A. D. 1905.

EATON & LOOMIS,
Attorney- for Defendant in Error.

2893. United States Circuit Court. Western District of Missouri. Western Division. J. A. Willoughby, Receiver of Capitol National Bank, *vs.* City National Bank. Citation. Filed June 5, 1905. Adelaide Utter, Clerk.

2 UNITED STATES OF AMERICA, *sct:*

The President of the United States of America, to the Honorable Judges of the Circuit Court of the United States for the Western Division of the Western District of Missouri, Greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you, at the April Term, 1905, thereof, between J. A. Willoughby, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, and The City National Bank of Kansas City, Missouri, a manifest error hath happened, to the great damage of the said J. A. Willoughby, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Eighth Circuit, together with this writ, so that you have the said record and proceedings aforesaid at the City of St. Louis, Missouri, and filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Eighth Circuit, on or before the thirty-first (31) day of July, 1905, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court.

Issued at office in Kansas City, this second (2) day of June, in the year of our Lord one thousand nine hundred and five.

[Seal of the United States Circuit Court, Western Division for the Western District of Missouri.]

ADELAIDE UTTER, *Clerk.*

Allowed by—
SMITH McPHERSON, *Judge.*

3 UNITED STATES OF AMERICA,
Western Division of the Western District of Missouri, sct:

In obedience to the command of the within Writ, I herewith transmit to the United States Circuit Court of Appeals, a duly certified transcript of the record and proceedings in the within entitled case, and with all things concerning the same.

In Witness Whereof, I hereto subscribe my name and affix the seal of said Circuit Court of the United States for the Western Division of the Western District of Missouri.

Issued at office in Kansas City, this Eleventh day of July, A. D. 1905.

[Seal of the United States Circuit Court, Western Division for the Western District of Missouri.]

ADELAIDE UTTER, *Clerk.*

2893. United States Circuit Court, Western District of Missouri, Western Division. J. A. Willoughby of Capitol Nat. Bank of Guthrie, Oklahoma Ter., *vs.* The City National Bank of Kansas City, Mo. Writ of Error. Filed June 2, 1905. Adelaide Utter, Clerk.

UNITED STATES OF AMERICA, *sct:*

Be it remembered, that heretofore, towit, on the 8th day of June A. D. 1904, there was filed in the office of the clerk of the Circuit Court of the United States for the Western Division of the Western District of Missouri, a petition in the case wherein J. A. Willoughby, Receiver of the Capitol National Bank of Guthrie Oklahoma Territory, is plaintiff and The City National Bank of Kansas City, Missouri, is defendant.

Said petition is in words and figures as follows:

In the United States Circuit Court for the Western Division of the Western District of Missouri.

J. A. WILLOUGHBY, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, Plaintiff,

vs.

THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendant.

Petition.

First Count. Plaintiff for first cause of action against the defendant states, that the Capitol National Bank of Guthrie, Oklahoma Territory, is and was at all the times herein referred to a national banking corporation duly created and existing under and by
4 virtue of the laws of the United States relative to national banks, (which said corporation will hereinafter be referred to as the Guthrie Bank), and was at all said times located in the City of Guthrie, in Oklahoma Territory; that he, the said J. A. Willoughby, is and has been since on or about the 4th day of April, 1904, the duly appointed, qualified and acting Receiver of the said Guthrie Bank, and institutes and prosecutes this suit as such and he is duly authorized and empowered so to do; that he and the said Guthrie Bank are citizens of Oklahoma Territory.

That the defendant, The City National Bank of Kansas City,

Missouri, is and was at all times herein referred to a national banking corporation duly created and existing under and by virtue of the laws of the United States relative to national banks, (which said corporation will be hereinafter referred to as the Kansas City Bank), and is and was at all such times located in Kansas City, Missouri, and is a citizen and inhabitant of the Western Division of the Western District of Missouri;

That the matter in dispute in this action exceeds, exclusive of interests and costs, the sum or value of Two Thousand Dollars, and arises under the laws of the United States;

That on or about September 9th, 1903, the defendant loaned to one Charles E. Billingsley the sum of Thirty Thousand Dollars in consideration of and as evidenced by the promissory note of said Billingsley then by him executed and delivered to the defendant, dated at Guthrie, Oklahoma Territory on September 9th, 1903, whereby he, the said Billingsley, did promise, for value received, to pay to the defendant sixty days after said date at the City National Bank in Kansas City, Missouri, the sum of Thirty Thousand Dollars, with interest from date at the rate of five per cent. per annum; that the said sum of Thirty Thousand Dollars so borrowed was, for full value received by said Billingsley from the said Guthrie Bank, by him transferred and paid unto the said Guthrie Bank, and a like sum was by the defendant, upon the order and at the request of the said Billingsley, placed to the credit of the said Guthrie Bank upon the books of the defendant bank as a deposit by and as due to said Guthrie Bank, and the said sum of Thirty Thousand Dollars and the credit thereof as aforesaid thereupon became and was the property of said Guthrie Bank; that upon the maturity of said note, to-wit, on November 9th, 1903, the defendant wrongfully, and without any authority from the said Guthrie Bank so to do, did pretend to charge the amount of said Billingsley note, together with interest thereon from its date, to-wit, the sum of Thirty Thousand Two Hundred and Fifty Dollars, to the said account and against the said deposit of the said Guthrie Bank with the defendant;

That on or about the maturity of said note the defendant and the said Billingsley entered into negotiations for an extension of the indebtedness represented by the said Billingsley note and shortly thereafter, to-wit, on November 23rd, 1903, the said Billingsley executed and delivered to the defendant his certain promissory note dated at Kansas City, Missouri, November 23rd, 1903, whereby on demand after date, he promised to pay to the defendant at its banking office in Kansas City, Missouri the sum of Twenty-five Thousand Dollars, with interest from date at the rate of five per cent. per annum; that the said note last described was executed, delivered and received by the parties thereto as and for an extension of the time for paying a part of the original loan hereinbefore referred to, to wit, the sum of Twenty-five Thousand Dollars; that upon the execution and delivery of the said note dated November 23rd 1903, the defendant did credit upon its books to the account of said Guthrie Bank, and as a deposit in favor of said Guthrie Bank

the sum of Twenty-five Thousand Dollars; that the defendant did not at the time it made the credit of Twenty-five Thousand Dollars to the account of said Guthrie Bank as aforesaid, or at any other time, pay or pretend to pay to the said Guthrie Bank the difference between the said credit of Twenty-five Thousand Dollars and its wrongful charge of Thirty Thousand Two Hundred and Fifty Dollars hereinbefore referred to;

That on or about April 4th, 1904, the defendant wrongfully and without any authority from said Guthrie Bank pretended to charge against the account upon the books of the defendant of the said Guthrie Bank the amount of the face of the said note of Charles E. Billingsley dated November 23rd, 1903 and certain interest claimed by the defendant to be due thereon, to-wit, the sum of Twenty-five Thousand and Thirteen and 90/100 Dollars; and defendant did appropriate to its own use in the transaction aforesaid money and property of the said Guthrie Bank of the value of Thirty-five Thousand Dollars, whereby the defendant is justly indebted to the plaintiff in the sum of Thirty-five Thousand Dollars; that by reason of the premises plaintiff has been damaged in the sum of Thirty-five Thousand Dollars:

Wherefore, plaintiff prays judgment against defendant for the sum of Thirty-five Thousand Dollars and interest at six per cent. per annum, and costs of suit.

Second Count. Plaintiff for second cause of action against the defendant states, that the Capitol National Bank of Guthrie, Oklahoma Territory is and was at all times herein referred to a national
6 banking corporation duly created and existing under and by virtue of the laws of the United States relative to national banks, (which said corporation will hereinafter be referred to as the Guthrie Bank), and was at all said times located in the City of Guthrie, in Oklahoma Territory; that he, the said J. A. Willoughby, is and has been since on or about the 4th day of April, 1904, the duly appointed, qualified and acting Receiver of the said Guthrie Bank, and institutes and prosecutes this suit as such, and he is duly authorized and empowered so to do; that he and the said Guthrie Bank are citizens of Oklahoma Territory;

That the defendant, The City National Bank of Kansas City, Missouri, is and was at all the times herein referred to a national banking corporation duly created and existing under and by virtue of the laws of the United States relative to national banks, (which said corporation will be hereinafter referred to as the Kansas City Bank), and is and was at all such times located in Kansas City, Missouri, and is a citizen and inhabitant of the Western Division of the Western District of Missouri;

That the matter in dispute in this action exceeds, exclusive of interests and costs, the sum or value of Two Thousand Dollars, and arises under the laws of the United States;

That on or about September 9th, 1903, the defendant loaned to one Chas. E. Billingsley the sum of Thirty Thousand Dollars in consideration of and as evidenced by the promissory note of said Billingsley then by him executed and delivered to the defendant,

dated at Guthrie, Oklahoma Territory on September 9th, 1903, whereby he, the said Billingsley, did promise for value received, to pay to the defendant sixty days after said date at the City National Bank in Kansas City, Missouri the sum of Thirty Thousand Dollars, with interest from date at the rate of five per cent. per annum; that the said sum of Thirty Thousand Dollars so borrowed was, for full value received by said Billingsley from said Guthrie Bank by him, transferred and paid unto said Guthrie Bank, and a like sum was by the defendant, upon the order and at the request of the said Billingsley, placed to the credit of the said Guthrie Bank upon the books of the defendant bank as a deposit by and as due to said Guthrie Bank, and the said sum of Thirty Thousand Dollars and the credit thereof as aforesaid thereupon became and was the property of said Guthrie Bank; that upon the maturity of said note, to-wit, on November 9th, 1903, the defendant wrongfully, and without any authority from the said Guthrie Bank so to do, did pretend to charge the amount of said Billingsley note together with interest thereon from its date to-wit, the sum of Thirty Thousand Two Hun-
7 dred and Fifty Dollars, to the said account and against the said deposit of the said Guthrie Bank with the defendant, and did thereby unlawfully receive, have and appropriate to its own use the said sum of Thirty Thousand Two Hundred and Fifty Dollars of the money and property of the said Guthrie Bank, and has failed and refused to pay the said sum or any part thereof to the said Guthrie Bank, or to plaintiff, although thereunto requested, to plaintiff's damage in the sum of Thirty-five Thousand Dollars;

Wherefore, plaintiff prays for judgment against defendant in the sum of Thirty-five Thousand Dollars, with interest thereon at the rate of six per cent. per annum, and costs of suit.

Third Count. Plaintiff for third cause of action against the defendant states, that the Capitol National Bank of Guthrie, Oklahoma Territory is and was at all the times herein referred to a national banking corporation duly created and existing under and by virtue of the laws of the United States relative to national banks, (which said corporation will hereinafter be referred to as the Guthrie Bank), and was at all said times located in the City of Guthrie, in Oklahoma Territory; that he, the said J. A. Willoughby, is and has been since on or about the 4th day of April, 1904, the duly appointed, qualified and acting Receiver of the said Guthrie Bank, and institutes and prosecutes this suit as such, and he is duly authorized and empowered [do] to do; that he and the said Guthrie Bank are citizens of Oklahoma Territory;

That the defendant, The City National Bank of Kansas City, Missouri, is and was at all the times herein referred to [—] a national banking corporation duly created and existing under and by virtue of the laws of the United States relative to national banks (which said corporation will be hereinafter referred to as the Kansas City Bank), and is and was at all such times located in Kansas City, Missouri, and is a citizen and inhabitant of the Western Division of the Western District of Missouri;

That the matter in dispute in this action exceeds, exclusive of in-

terests and costs, the sum or value of Two Thousand Dollars, and arises under the laws of the United States;

That on or about April 4th, 1904, the defendant had in its possession and under its control money, effects and credits of and belonging to the said Guthrie Bank to the amount and of the value of Twenty-five Thousand and Thirteen and 90/100 Dollars; that thereupon, to-wit, on the 4th day of April, 1904, the defendant did unlawfully and wrongfully and without the consent of said Guthrie Bank, receive and appropriate to its own use said money,
8 effects and credits of the said Guthrie Bank to the amount and of the value of Twenty-five Thousand and Thirteen & 90/100 Dollars, and has from that time forward failed and refused to pay over or account to the said Guthrie Bank or of plaintiff herein, said money, effects and credits, although thereunto at that time requested, whereby defendant is justly indebted to the plaintiff in the sum of Thirty-five Thousand Dollars;

Wherefore, plaintiff prays judgment against the defendant for the sum of Thirty-five Thousand Dollars, with interest at the rate of six per cent. per annum, and for costs of suit.

SCARRITT, GRIFFITH & JONES,
FLYNN & AMES,
Attorneys for Plaintiff.

Thereupon a writ of summons was duly issued and served upon the defendant.

Afterwards on the 7th day of November, A. D. 1904, the following entry appears of record:

2893.

J. A. WILLOUGHBY, Rec'v'r,
vs.
THE CITY NAT'L BK. OF K. C., Mo.

This day comes defendant by its attorney and files answer.

And on the 21st day of November, 1904 the following entry appears of record:

2893.

J. A. WILLOUGHBY, Rec'v'r,
vs.
THE CITY NAT'L BK. OF K. C., Mo.

This day comes plaintiff by his attorneys and files reply.

Afterwards, towit, on the 21st day of December, A. D. 1904 the following entry appears of record:

2893.

J. A. WILLOUGHBY, Receiver,
vs.
THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI.

This day come the parties by their attorneys, the plaintiff by Scarritt, Griffith & Jones and Flynn & Ames and the defendant by Milton Moore and Eaton & Loomis. Thereupon defendant files amended answer and plaintiff files reply thereto and a written stipulation of parties is filed waiving a jury. Thereupon the hearing of this case is proceeded with before the Court without the
9 intervention of a jury, evidence on the part of plaintiff is begun and the same not being concluded at the hour of adjournment, further proceedings are postponed until tomorrow morning.

Said Amended answer is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

J. A. WILLOUGHBY, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, Plaintiff,
vs.
THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendant.

Amended Answer.

First. The defendant for its amended answer says that each of the three counts alleged in the plaintiff's petition relate to and are based upon the same notes and the same transactions, and the defendant now here files its amended answer to each and all of said counts, and says and alleges that it denies each and every allegation in said petition contained in each of the counts thereof, except such as are hereinafter expressly admitted.

Second. This defendant admits the corporate organization and existence of the Capitol National Bank, of Guthrie, Oklahoma Territory, and the appointment of the said J. A. Willoughby as receiver thereof, and avers that the said Capitol National Bank, of Guthrie, Oklahoma Territory, hereinafter called the Guthrie Bank, for a long time prior to the transactions mentioned in the petition of the plaintiff and thereafter had a large number of transactions with this defendant, and that said Guthrie Bank kept an active, open account with this defendant, in which deposits were made almost daily, and checks or drafts made thereon almost daily, and kept in said account large balances, and conducted business practically continuously with defendant in large sums and in the manner customary in such cases between banks. That the business of said Guthrie

Bank with this defendant, and as defendant believes, the business of said Guthrie Bank in other respects was managed, directed, controlled and supervised by one Chas. E. Billingsly, its President and who by long and uninterrupted course of business, was the head, the chief officer and manager thereof and all of which business was so transacted under the supervision and management of said President as aforesaid, by the open and acquiescent consent of the board of directors of the said Guthrie Bank.

10 The defendant admits the receipt of the Thirty Thousand Dollar ($30,000.00) note mentioned in the petition and admits that the same was signed by Chas. E. Billingsly and avers that on the date of said note, the said Billingsly, acting as such president and in the management and direction of the said Guthrie Bank, and for and in behalf of said Guthrie Bank, entered into a contract with this defendant, whereby it was agreed that said Billingsly should sign said note, and that this defendant should accept the same and place the proceeds thereof to the credit of the Guthrie Bank, on the books of this defendant as a special deposit, and that the fund so placed to the credit of the said Guthrie Bank should not be subject to check, but should remain with defendant bank until the maturity of said note, and as security for the payment thereof.

And it was further agreed that the defendant bank should be authorized to charge said note against said special account when due, or at any other time when defendant might so desire.

And this defendant further avers that by and under the terms of said contract and agreement it accepted the said note from said Billingsly, president, acting as aforesaid, and placed the proceeds thereof to the credit of said Guthrie Bank, and that afterwards when said note became due and default was made in the payment thereof, this defendant, as provided and authorized by the terms of said agreement, charged said note against said special account, and thereby cancelled and closed said special account, and [returned] the said note to said Guthrie Bank, or the said Billingsly, its president, acting for and in behalf of said bank, as aforesaid.

And this defendant admits the receipt of the Twenty-five Thousand Dollar ($25,000.00) note mentioned in the plaintiff's petition, and that the same was signed by Chas. E. Billingsly that at the time of signing said note the said Billingsly, acting as such president and for and in behalf of said Guthrie Bank, entered into a contract and agreement with this defendant, whereby it was agreed that said Billingsly would sign said note, and that this defendant should accept the same and place the proceeds thereof to the credit of the said Guthrie Bank, as a special deposit, it being then expressly agreed and understood that said fund should not be subject to check, but remain with defendant bank, as a special deposit and as security for the payment of the said note, and that defendant bank might charge said note against said special deposit when due, or at any time it might so desire. That defendant bank accepted said note under the terms of said contract, and agreement, and afterwards and pur-

suant thereto, placed the proceeds of said note to the credit
11 of the said Guthrie Bank as a special deposit in a special account for the purposes aforesaid, and that afterwards when said note became due and payment thereon had not been made, this defendant bank under the terms of said contract and agreement charged said note against said special account, cancelled the note and returned the same to said Guthrie Bank, or to said Billingsly its president, acting as aforesaid, and closed said transaction upon its books, and the defendant avers that there is nothing owing on account of said special deposit.

And the defendant states and avers that it received no money or other consideration for the said special deposit from the said Guthrie Bank or the said Billingsly or any one in behalf of said Guthrie Bank other than said notes, under the contract aforesaid.

And this defendant further says and avers that it is informed and believes and charges the fact to be that the said Guthrie Bank accepted said special deposit and availed itself of the advantages and profits thereof, and fully accepted, ratified and confirmed each and all of the said contracts and agreements so made by its president in its behalf as aforesaid, and said contracts were fully performed by the parties thereto and in exact accordance therewith.

Wherefore this defendant having fully answered, asks judgment and that it may recover its costs herein expended.

MILTON MOORE,
EATON & LOOMIS,
Attorneys for Defendant.

Said reply is in words and figures as follows:

In the United States Circuit Court for the Western Division of the Western District of Missouri.

No. 2893.

J. A. WILLOUGHBY, Receiver Capitol National Bank, Guthrie, Oklahoma, Plaintiff,
vs.
CITY NATIONAL BANK OF KANSAS CITY, Defendant.

Reply to Amended Answer.

Now comes plaintiff and for reply to the amended answer herein denies each and every allegation of new matter herein contained.

For further reply plaintiff states that at the times the loans were made by the defendant to Charles E. Billingsley mentioned
12 in the defendant's amended answer the defendant well knew that the said Billingsley was borrowing the sums so loaned to him for his individual use, and plaintiff states that the sums of money borrowed by said Billingsly from the defendant and referred to in the said amended answer, were borrowed by him for his individual use and were applied by him to his own use; that the

said Billingsly in making said loans was acting in his own behalf and was acting in that matter wholly without the knowledge or sanction of the Capitol National Bank of Guthrie, Oklahoma, and was without authority or power to obligate or bind said bank in respect to the said transactions or to pay said loans, or to make the alleged contract set out in said amended answer on behalf of said bank, all of which was well known to the defendant.

Wherefore, plaintiff prays judgment as in his petition.

FLYNN AND AMES AND
SCARRITT, GRIFFITH & JONES,
Attorneys for Plaintiff.

Said Stipulation waiving a jury is in words and figures as follows:

In the United States Circuit Court within and for the Western Division of the Western District of Missouri.

J. A. WILLOUGHBY, Receiver of the Capitol National Bank of Guthrie, Oklahoma,
vs.
THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI.

Stipulation.

It is hereby stipulated by the parties to the above entitled cause that a trial by jury of this cause is hereby waived and that the cause shall be tried by the court without a jury.

FLYNN & AMES,
SCARRITT, GRIFFITH & JONES,
Attorneys for the Plaintiff.
MILTON MOORE,
EATON & LOOMIS,
Attorneys for the Defendant.

And on the 22nd day of December the following entry appears of record:

13 2893.

J. A. WILLOUGHBY, Rec'v'r,
vs.
THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI.

This day again come the parties by their attorneys. Thereupon further evidence on the part of the plaintiff is heard and the same not being concluded at the hour of adjournment, further proceedings are postponed until tomorrow morning.

And on the 23rd day of December the following entry appears of record:

2893.

J. A. WILLOUGHBY, Rec'v'r,
vs.
THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI.

Now on this day again come the parties by their attorneys. Thereupon plaintiff rests and the defendant requests the Court to declare the law to be that under the pleadings and the evidence the finding and judgment should be for the defendant which request is by the Court overruled. Thereupon the parties file a written request that the Court make and state in writing special findings of fact in this case and a stipulation as to the submission thereof and thereupon evidence on the part of defendant is heard and leave is granted defendant to take the deposition of L. S. Selsar as to certain facts and it is ordered that the argument and final submission of this case be postponed until some future time to suit the convenience of Court and counsel.

Said Stipulations are in words and figures as follows:

In the United States Circuit Court for the Western Division — the Western District of Missouri.

J. A. WILLOUGHBY, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, Plaintiff,
vs.
THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendant.

Come now the plaintiff and defendant by their attorneys, respectively and move and request the court to make and state in writing special findings of facts in this case.

FLYNN AND AMES AND
SCARRITT, GRIFFITH & JONES,
Attorneys for Plaintiff.
MILTON MOORE,
EATON & LOOMIS,
Attorneys for Defendant.

14 In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2892.

J. A. WILLOUGHBY, Receiver of the Capitol National Bank, Plaintiff,
vs.
CITY NATIONAL BANK OF KANSAS CITY, Defendant.

Stipulation.

It is hereby stipulated between the parties to the above entitled cause that the cause shall be submitted to this court, the Honorable

Page Morris, sitting as Judge, upon the pleadings and proofs adduced by the parties and that the respective parties hereto may submit special findings of fact and declarations of law, and that said Judge may take the cause under advisement and hereafter make special findings of fact and declarations of law and render judgment herein and in his absence from this judicial district transmit the same to the Clerk of this court, which findings of fact, declarations of law and judgment shall thereupon be entered of record and rendered in this court in the absence of the Honorable Page Morris from this district with the same force and effect as though the court were sitting in regular session with the Honorable Page Morris presiding, and that any other Judge then or thereafter sitting in this court may make and enter all such orders and judgments as may be necessary to secure a review of the findings, declarations of law and judgment so entered and rendered and for an appeal or writ of error in the cause.

SCARRITT, GRIFFITH & JONES,
FLYNN & AMES,
Attorneys for Plaintiff.
MILTON MOORE,
EATON & LOOMIS,
Attorneys for Defendant.

Afterwards, to wit on the 10th day of March, A. D. 1905, the following entry appears of record:

2893.

J. A. WILLOUGHBY, Receiver,
vs.
THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI.

This case having come on for further hearing and the same having been duly argued by counsel it is now submitted to the Court and by the Court taken under advisement.

15 Afterwards, on the 24th day of April A. D. 1905, the same being a day of the regular April term of said Court, the following entry appears of record:

2893.

J. A. WILLOUGHBY, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory,
vs.
THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI.

Now on this day come the parties by their attorneys, the plaintiff by Messrs. Scarritt, Griffith & Jones and Messrs. Flynn & Ames and the defendant by Mr. Milton Moore and Messrs. Eaton & Loomis and this cause having at the November term, 1904, of this Court

been tried to the Court a jury having been waived by a stipulation in writing duly filed herein, and the Court having taken said cause under advisement and having now made and filed herein its findings of fact and conclusions of law in words and figures as follows:

"In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City, November Term, 1904.

No. 2893.

J. A. WILLOUGHBY, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, Plaintiff,

versus

THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendant.

Findings of Fact and Conclusions of Law.

A jury having been waived in this action, and the Court having heard the evidence and the arguments of counsel, and having duly considered the same, now makes and files the following Findings of Fact and Conclusions of Law:

1st. That the Capitol National Bank of Guthrie, Oklahoma Territory, is and was at all the times herein referred to a national banking corporation duly created and existing under and by virtue of the laws of the United States relative to national banks, (which said corporation will hereinafter be referred to as the Guthrie Bank), and was at all said times located in the City of Guthrie in Oklahoma Territory; that the said J. A. Willoughby is and has been since the month of April, 1904, the duly appointed, qualified and acting Receiver of the said Guthrie Bank, and institutes and prosecutes this suit as such, and he is duly authorized and empowered so to do; that he and the said Guthrie Bank are citizens of Oklahoma Territory;

16 2nd. That the defendant, the City National Bank of Kansas City, Missouri, is and was at all the times herein referred to a national banking corporation duly created and existing under and by virtue of the laws of the United States relative to national banks (which said corporation will be hereinafter referred to as the Kansas City Bank) and is and was at all such times located in Kansas City, Missouri, and is a citizen and inhabitant of the Western Division of the Western District of Missouri;

3rd. That for sometime prior to the 4th day of September, 1903, and thereafter, the said Guthrie Bank had a large number of transactions with the defendant, and the said Guthrie Bank kept an active open account with the defendant, in which deposits were made from time to time and checks or drafts made thereon, from time to time, and conducted business practically continuously with the defendant in large sums and in the manner customary in such cases between banks; that the business of said Guthrie Bank with the defendant, and with others, was man-ged, directed and supervised by Charles E. Billingsley, its President, and the said Charles E.

Billingsley had been by a long course of business the chief officer and manager thereof, and especially in reference to the making of loans, he in most instances dictating the correspondence and carrying on the negotiations.

4th. On September 4th, 1903, said Charles E. Billingsley wrote from Guthrie, Oklahoma, Territory, to James G. Strean of Kansas City, Missouri, who was then, and ever since has been cashier of defendant, the following letter (part of heading omitted):

"CAPITOL NATIONAL BANK, GUTHRIE, OKLA.,
September 4, 1903.

FRIEND STREAN: My stenographer is not on deck, so you will have to try and read my scrawl.

I want you to take my note of 30,000.00 and Cr. my Bank with like amount in a special account with the understanding that said account is not to be checked against.

My reason for wanting this is that I have that amount of excessive loans that the Department is kicking about, and I will be unable to reduce them to limit for 3 or 4 months. But do not want .ake a discount and pay interest when it is not necessary. Will you do this for me? I have handled this before in this way with our old K. C. account, so suppose it will be all O. K., with you as you will not be out any money and loan and deposit will offset each other on your books.

17 With kind regards and thanking you in anticipation, I am as ever,

Your friend, CHAS. E. BILLINGSLEY."

Prior to the writing of this letter, and about the 1st day of September, 1903, the said Guthrie Bank had been examined, and the Bank Examiner had complained of excessive loans, and particularly of three notes for ten thousand dollars each, one made by the Missouri, Kansas & Oklahoma Company, one made by the Wild West Show Company, and the other by the Western Horse Show Company, which notes will be hereinafter more particularly described, and had directed that these excessive loans should be reduced.

5th. On September 5th, 1903, James G. Strean, wrote to Charles E. Billingsley in answer to the letter set out in the preceding finding as follows: (heading omitted)

"CITY NATIONAL BANK, KANSAS CITY, MO., *Sept.* 5, 1903.

Chas. E. Billingsley, Esq., Guthrie, O. T.

DEAR MR. BILLINGSLEY: Yours of the 4th received and noted, and I presented your letter of the 4th to our board and they are willing to make you $30,000.00 loan, but say they cannot do it at a less rate than 5 per cent. as we pay 2 per cent. on the balance, and considering the amount we have to keep in reserve against this, they think that is as good as you should ask, and I know we could not do any better if we were to ask the same of any of our correspondents, if they should do as well.

The worst I dislike about it is it will increase our loans and if anything would have a tendency to decrease our deposits.

I trust that this will be satisfactory to you, as we wish to satisfy you, and assure you it is our desire to do so in every way possible and whenever we can.

With kind personal regards, and best wishes, I am,

Very truly yours, J. G. STREAN, *Cashier.*"

6th. On September 8th, 1903, Charles E. Billingsley, President wrote to James G. Strean, as follows (heading omitted):

CAPITOL NATIONAL BANK, GUTHRIE, OKLA., *Sept.* 8, 1903.

FRIEND STREAN: I am in receipt of yours of the 5th for which accept my thanks. I hand you herewith my note for 30 Th at 60 days 5% from date and have given the Capitol Nat'l Bank
18 check on you for like amount and it is agreed that said Capitol Nat'l Bank is to keep this 30 Th with you until note is retired together with as large a balance as possible.

Again thanking you & with kind personal regards, I am,

Your friend, CHAS. E. BILLINGSLEY, *Pres't.*"

The note therein referred to as was executed by Charles E. Billingsley, and is in words and figures as follows:

"GUTHRIE, OKLA., *Sept.* 9, 1903.

250
$30,000.00

30,250.00

Sixty days (60) without grace, after date, for value received, I, as principle promise to pay to the order of the City National Bank Thirty thousand and no/100 dollars at the City National Bank, Kansas City, Missouri.

Both principal and interest payable in United States Gold Coin, at the present standard of value, with interest at 5 per cent. per annum from date until paid, interest to become as principal when due and bear the same rate of interest. The makers and endorsers of this note hereby severally waive presentment for payment, notice of non-payment, protest and notice of protest, and consent that time of payment may be extended without notice thereof. Appraisement and all exemptions waived. If suit be instituted we agree that judgment be rendered for ten per cent. additional as attorneys' fees and we hereby give full authority to said City National Bank, or its assigns, to sell any collateral security assigned or attached at public or private sale, without notice upon non-payment of this note.

(Signed) CHAS. E. BILLINGSLEY."

Stamped across the face of the above note with rubber stamp is the following: "City National Bank, Paid, Nov. 9, 1903, Kansas City, Missouri."

7th. On September 9, 1903, Charles E. Billingsley delivered and deposited his personal check on defendant for thirty thousand dollars ($30,000) in the said Guthrie Bank, which was by that bank received, and the amount thereof was credited on that day to Charles E. Billingsley's personal account on its books, and charged to the Kansas City Bank on its general account. Said check is in words and figures as follows:

"The Capitol National Bank, Guthrie, Oklahoma, September 8th, 1903. On demand pay to the order of yourselves $30,000.00,
19 Thirty Thousand and no/100 dollars. Chas. E. Billingsley.
To City National Bank, Kansas City, Mo.

The endorsement on the back of said check by a rubber stamp is as follows: "pay to the order of any bank or banker, Capitol National Bank of Guthrie, Oklahoma, G. A. Nelson, Cashier," and stamped across the face of said check, with rubber stamp, is the following: "City National Bank, Paid, Sep. 10, 1903, Mail Teller."

On the same date, to-wit: September 9th, 1903, said check was by said Guthrie Bank transmitted, in the regular course of business, to the defendant, along with other items enclosed in a letter upon the usual blank, which contained the following heading:

THE CAPITOL NATIONAL BANK OF GUTHRIE, OKLA., *Sep.* 9, '03.

City National Bank, Kansas City, Missouri.

We enclose for collection and credit cash items as stated below. Items marked X no protest. Do not protest any items under 10 days."

The entire remittance, inclusive of the $30,000 check, amounted to $56,257.64.

8th. On September 9th, 1903, the Guthrie Bank received the personal check of Charles E. Billingsley, which is in words and figures as follows:

"GUTHRIE, OKLA., *Sept.* 8, 1903.

The Capitol National Bank. Pay to bank or bearer $30,000.00 Thirty Thousand Dollars and no/100 dollars.

CHAS. E. BILLINGSLEY."

Stamped across the face of said check, with rubber stamp, is the following: "Capitol Nat. Bank, Paid, Sept. 9, 1903, Teller, Guthrie, O. T." This check was charged to the personal account of Charles E. Billingsley upon the books of the Guthrie Bank, and the same amount was credited to the Bills Receivable account on the books of said bank, and there were taken up or charged out of the assets of the said bank three promissory notes then owned by said bank, described as follows:

One note No. 8762, dated June 8th, 1903, due sixty days thereafter, for $10,000, made by the Missouri, Kansas & Oklahoma Company. This note had been discounted by the Guthrie Bank in the regular course of business on June 8th, 1903.

One note No. 8763, dated June 8th, 1903, due sixty days there-

after, for $10,000, made by the Wild West Show Company. This note had been discounted by the Guthrie Bank in the regular course of business on June 8th, 1903. The two notes last described
20 were written and signed by Chas. E. Billingsley as Treasurer and Vice-President of the makers, and the proceeds of their discount were credited on the books of the Guthrie Bank to the account of the St. Louis & San Francisco Railroad Company and the Wild West Show Company in the sums of $15,749.75 and $4250.25, respectively both of whom were customers of and each kept an ordinary bank account with the Guthrie bank at that time, and on that date before said credits the St. Louis & San Francisco Railroad Company's account was overdrawn $15,749.75, and the Wild West Show Co.'s account was overdrawn $2234.07.

One note, No. 9991, dated July 29th, 1903, due ninety days thereafter, for $10,000, made by the Western Horse Show Company. This note had been discounted by the Guthrie bank in the regular course of business on July 29th, 1903, and the proceeds of that discount credited on its books to the account of W. D. Fossett, who was a customer of and kept an ordinary bank account with the Guthrie bank at that time, and which account on that date, before said credit, was overdrawn $5871.12.

These three promissory notes, Nos. 8762, 8763 and 9991, were taken out of the assets and from the possession of the Guthrie bank, and are not now in said assets, and it does not appear what has become of them.

The Guthrie bank made the credit ticket charging off the above notes on September 8th, 1903. These notes are the ones hereinbefore referred to as having been objected to by the Bank Examiner on his examination made on the 1st day of September, 1903.

9th. On September 9th, 1903, Charles E. Billingsley wrote and sent by mail the following letter:

"CAPITOL NATIONAL BANK, GUTHRIE, OKLA., *Sept.* 9, 1903.

Mr. Sturdevant, National Bank Examiner, Oklahoma City, Okla.

MY DEAR SIR: Agreeable to my promise I beg to advise that I have this day had paid to the bank the M. K. & O. R. R. Co., the Wild West Horse Show, and the Western Horse Show Company notes.

Trusting this will meet with your approval, I beg to remain,

Yours very truly,

(Signed) CHAS. E. BILLINGSLEY, *President.*"

10th. On September 10th, 1903, the letter of the Guthrie bank transmitting the check of Chas. E. Billingsley for $30,000 was received by the Kansas City bank, and opened by the bookkeeper, Mr. Strean, the Cashier of the bank, was on that day absent
21 from the bank, and the letter to Mr. Strean, enclosing Mr. Billingsley's note for $30,000, not having been opened, the following telegrams passed between the Kansas City bank and Chas. E. Billingsley:

Telegram: "9-10-03. C. E. Billingsley, care of Capitol National Bank, Guthrie, Okla. Your personal check on us thirty thousand received in bank's letter 9th. No credit. Advise us. City National Bank. Collect."

Telegram: "Guthrie, O. T. September 10, 1903. To City National Bank, Kansas City, Missouri. Hold check for arrival of my letter which has evidently miscarried. C. E. Billingsley."

Upon receipt of this last telegram the letter from Chas. E. Billingsley, President, to Mr. Strean, enclosing note for $30,000, was opened at the Kansas City bank by the book-keeper, and then on the same day, September 10th, 1903, the proceeds of said note were credited on the books of the Kansas City bank to the personal account of Charles E. Billingsley, and a deposit slip was made at the time to evidence the transaction in words and figures as follows:

Deposited with City National Bank of Kansas City.

By C. E. Billingsley.

SEPT. 10, 1903.

	Dollars.	Cents
Currency		
Gold		
Silver		
Checks as follows.....	30,000."	

And said note was charged to the account of Bills Receivable on the books of said Kansas City Bank, on the same day. The check of Charles E. Billingsley for $30,000, which had been transmitted by the Guthrie Bank, was on the same day charged to the personal account of Charles E. Billingsley on the books of the Kansas City bank, and the general account of the Guthrie bank was credited, on the books of the Kansas City Bank, with said amount.

11th. On September 14, 1903, Mr. Strean having returned to the bank and finding the entries of the Billingsley note and check made as set forth in the preceding finding, caused $30,000 to be charged to the general account of the Guthrie bank and credited to said bank, in a special account, denominated by defendant on its books "Capitol National Bank, Guthrie, No. 2," hereinafter called
22 "Special" or "No. 2" account, and a credit slip evidencing the transfer was made and kept, in words and figures as follows:—

KANSAS CITY, MO., *Sept.* 11, 1903.

"City National Bank.
Credit. Capitol N/B Guthrie a/c No. 2.
From Reg. a/c. $30,000."

Stamped on the back of said paper, with rubber stamp, is the following: "City National Bank, Paid, Sept. 14, 1903. Receiving Teller." While the credit slip was dated September 11th, the entries were made on September 14th.

And on September 15th, 1903, J. G. Strean, Cashier, wrote and sent by mail to Charles E. Billingsley the following letter:

CITY NATIONAL BANK, KANSAS CITY, Mo., *Sept.* 15, '03.

C. E. Billingsley, Esq., Guthrie, Okl. Ty.

DEAR SIR: We have this day charged regular account of Capitol Nat'l Bank of Guthrie $30,000.00 and credited to No. 2 account being amount of your loan Sept. 11.

Very truly yours, J. G. STREAN, *Cashier.*"

The "special" or No. 2 account of the Guthrie bank was opened on defendant's books by the credit of $30,000, pursuant to the credit slip above set out, on September 14th, 1903, and thereafter, all transactions regarding said $30,000 note, and the $25,000 note hereinafter referred to, and the interest charged on each of said notes, except as hereinafter noted and found, and credits of interest on the deposit created by the proceeds of said notes, were entered in said "special" or "No. 2" account, which is as follows:

23 "Capitol Nat'l Bank, Guthrie, O. T., Dr., in Account with City National Bank of Kansas City, Kansas City, Mo., Cr.

Special.

1903.		1903.	
Nov. 9 Note.....	$30,250.00	Sept. 14 Transfer...	$30,000.00
1904.		29 Int.	23.00
Apl. 4 Note.....	25,000.00	Oct. 31 Int.	49.32
		Nov. 28 Int.	19.73
		Dec. 7 Note	25,000.00
		31 Int.	28.49
		1904.	
		Jan'y 29 Int.	42.14
		Feb'y 27 Int.	42.30
		Mar. 29 Int.	39.56
		Apr. 4 Balance....	5.46
	$55,250.00		$55,250.00

It will be seen that this account stood after the credit of $30,000 on defendant's books without change until September 29th, 1903, when it was credited with $23.00, making the account in favor of the Guthrie bank in the sum of $30,023.00. This $23.00 represents interest at two per cent. per annum allowed by defendant on the Guthrie bank balance from September 1*th*, to 30th. This account stood in that form until October 31st, 1903, when it was again credited with $49.32 which sum represents interest for the month of October, 1903, so that on November 1st, 1903, the account showed a credit in favor of the Guthrie Bank of $30,072.32. This account remained unchanged thereafter until November 9th, 1903, when it was charged with the amount, including interest at five per cent. per annum, then due on the note of Charles E. Billingsley, herein-

before referred to, namely, $30,250.00, leaving the account then overdrawn in the sum of $177.68.

12th. On November 9th, 1903, the defendant charged the amount then due on the note of Chas. E. Billingsley of $30,000, hereinbefore referred to, against the "special" or "No. 2" account on defendant's books, and made and kept a deposit slip representing that transaction, which is in words and figures as follows:

"City National Bank. KANSAS CITY, Mo., *Nov.* 9, 1903.

Debit: Capitol Nat'l Bank, Guthrie, O. T. Special.

Note C. E. Billingsley..... $30,250.00"

24 No corresponding entry was made on the books of the Capitol National Bank.

13th. On November 7th, 1903, the following letter was written by C. E. Billingsley, President, to J. G. Strean, Cashier, and sent by mail:

CAPITOL NATIONAL BANK, GUTHRIE, OKLA., *Nov.* 7, 1903.

J. G. Strean, Cashier, City National Bank, Kansas City, Mo.

FRIEND STREAN: My note for $30,000 will be due Monday. I would thank you to kindly extend this thirty or sixty days and charge our account with interest, and advise, and oblige. Trust this will meet with your approval.

Yours truly, CHAS. E. BILLINGSLEY, *President.*"

This letter was received by the defendant November 9th, 1903, and on that day J. G. Strean, Cashier, wrote and sent by mail to Chas. E. Billingsley, the following letter.

CITY NATIONAL BANK, KANSAS CITY, Mo., *Nov.* 9, 1903.

Chas. E. Billingsley, Esq., Guthrie, O. T.

DEAR CHARLEY: Your letter of the 7th received and you say that your note for $30,000 will be due Monday; well old man we have taken you at your word; we have charged your account with note, and return same herein, for the reason Charlie we can find no collateral. Mr. Jurden is out of town, and we of course, will be glad to renew it for you on satisfactory collateral, and I enclose blank collateral note herein for that purpose. If the collateral was returned to you, let me know. I was out of town when this loan was made, and you can bet your boots old man we are going to treat you right. With kind personal regards, I remain,

Very truly yours, J. G. STREAN, *Cashier.*"

14th. On November 22nd, 1903, Chas. E. Billingsley, President, wrote and sent by mail to J. G. Strean, Cashier, the following letter:

CAPITOL NATIONAL BANK, GUTHRIE, OKLA., *Nov.* 22, 1903.

J. G. Strean, Cashier, City National Bank, Kansas City, Mo.

DEAR SIR: I am in receipt of your favor of the 9th enclosing my note for 30,000., all of which I note. I would have replied ere this

but expected to see you at the convention and as you know
25 I had Mr. Nelson call on you to explain this situation fully hence I will not attempt to go into detail now, and beg to hand you herewith my note for $30,000., which kindly do with as you did on the previous instance. You understand that this fund is not to be drawn out at any time. It is to be kept there at all times to protect this note, but we simply want it to stand there for our credit for reasons stated to you by our Mr. Nelson. Trusting this is satisfactory, beg to remain,

Yours truly, CHAS. E. BILLINGSLEY, *President.*

15th. On November 23rd, 1903, G. A. Nelson, Cashier of the Guthrie Bank, wrote and sent to J. G. Strean Cashier of the Kansas City bank, the following letter (heading omitted):

CAPITOL NATIONAL BANK,
GUTHRIE, OKLA., *Nov.* 23, 1903.

J. G. Strean, Cashier City National Bank, Kansas City, Mo.

DEAR SIR: Upon my return and after the rush of the convention I find your letter of Nov. 3, relative to Merchants National Bank at Houston, Texas, and will say that their assistant Cashier, Mr. W. H. Hurley, was in attendance at the Convention and I had quite a nice chat with him relative to his business. He is going to furnish us with a par list and we hope to be able to give him some business, as we know they are able to handle it and also do what we can with you in this.

We are indeed sorry that you were not able to be with us at the convention as everybody seemed to have a very pleasant time, and the convention was voted the greatest success in Oklahoma meetings.

Mr. Billingsley informed me that he forwarded you the note which I spoke to you about, last Saturday, and by the way Friend Strean, How did you come out with that account at Dover? If you have not received that, let me know and I will take it up again.

With kind personal regards,

Yours truly, G. A. NELSON, *Cashier.*"

16th. On November 24th, 1903, S. W. Jurden, then being President of defendant, wrote and sent by mail to Chas. E. Billingsly in answer to the letter set out in finding fourteenth, the following letter:

26

CITY NATIONAL BANK,
KANSAS CITY, MO., *Nov.* 24, 1903.

Chas. E. Billingsley, Esq., Guthrie, O. T.

DEAR SIR: Your letter of the 23rd received addressed to Mr. Strean. Mr. Strean is [our] of the city to-day and will probably not return until tomorrow. I have your note for $30,000.00 which you enclosed, requesting us to place proceeds to the credit of your bank as a special deposit. In presenting this matter to our attorney he suggested that we make a demand note instead of 60 day note which we are perfectly willing to carry. Instead of making it for

$30,000.00 we prefer to keep within our limit as the Comptroller has taken us to task several times for making excessive loans. We did not suppose the $50000. would make any material difference so we have made note for $25,000.00, which I enclose herein together with a letter which when signed and returned to us with the note, the proper credit will be given as per your letter.

Trusting this will be entirely satisfactory, we remain,

Very truly yours, S. W. JURDEN, *Pt.*"

17th. On November 30th, 1903, Chas. E. Billingsley, President, wrote and sent by mail to S. W. Jurden, in answer to the letter set out in the preceding finding, the following letter:

"CAPITOL NATIONAL BANK,
GUTHRIE, OKLA., *Nov.* 30, 1903.

S. W. Jurden, Pres., City National Bank, Kansas City, Mo.

DEAR SIR: I am in receipt of your- of the 24th all of which I note. I have executed the $25,000.00 note and signed letter as per your request, and hand you the same herewith. Trust this is satisfactory and with kind regards, beg to remain.

Yours truly, CHAS. E. BILLINGSLEY, *President.*"

With this letter were enclosed in the same envelope and sent by mail with it, the following letter and note:

"GUTHRIE, OKLA., *November* 23, 1093.

James G. Strean, Esq., Cashier City National Bank, Kansas City, Mo.

DEAR SIR: Herewith find enclosed my demand note for $25,000. bearing interest at the rate of 5% per annum from date. Please place the proceeds of this note as a special deposit to the credit of the Capitol National Bank of Guthrie, Okla. It being expressly understood and agreed that this fund is not subject to check but is to remain with the City National Bank for the payment of
27 this note, and you are hereby authorized to charge this note to said account at any time you desire.

Very truly yours,

CHAS. E. BILLINGSLEY." (*Prest.*)

$25,000.00. KANSAS CITY, MO., *Nov.* 23, 1903.

Demand after date I or we promise to pay The City National Bank of Kansas City, or order, at its banking rooms in Kansas City, Missouri, Twenty Five Thousand Dollars, for value received with interest from date at the rate of five per cent. per annum.

CHAS. E. BILLINGSLEY, *Pt.*"

No. 6512, Guthrie, Okla.

Stamped across the face of above note, with rubber stamp, is the following: "City National Bank, Paid, April 4, '04, Kansas City, Mo.

On the back or reversed side of said note appears the following:
"..... interest paid to Dec. 31, 1903.
167-66 interest paid to Jany. 31, 1904.
..... interest paid to ....."

Neither when the foregoing letter of November 30th, 1903, was received by the defendant, nor on December 7th, 1903, when the note for $25,000.00 was credited by the Kansas City Bank on the "special" or "No. 2" account, were the letters "p-r-e-s-t" following the name of Chas. E. Billingsley on the letter of November 23, 1903. Those letters were placed there by Chas. E. Billingsley on or about December 15th, 1903, pursuant to correspondence hereinafter set forth.

The letters "p-t" after the name Chas. E. Billingsley, which were put on the note by said Billingsley when it was signed, were erased by S. W. Jurden, then President of defendant, about December 16th, 1903, conformably to instructions given to him by Charles E. Billingsley, in the correspondence hereinafter set forth.

18th. On November 30th, 1903, Chas. E. Billingsley signed and delivered to the Teller of the Guthrie bank his personal check on that bank, in words and figures as follows:

GUTHRIE, OKLA., *Nov.* 30, 1903.

The Capitol National Bank. Pay to Part City Nat., or bearer, $5000.00, Five Thousand no/100 Dollars. Chas. E. Billingsley." "Paid."

Stamped with rubber stamp across the face of said check is the following: "Capitol National Bank. Paid Nov. 30, 1903. Teller. Guthrie, O. T.

28 This check was written in the handwriting of G. A. Nelson Cashier of the Guthrie bank.

And thereupon the account of Chas. E. Billingsley with said Guthrie bank was debited with the amount of said check, and defendant's general account on the books of said Guthrie bank was credited with the same amount. Defendant was not advised of that transaction. The purpose of Chas. E. Billingsley in making this check and of the subsequent entries upon the books of the said Guthrie bank was to make the status of the balance of the account of the defendant with said Guthrie bank, as shown on the books of said Guthrie bank, correspond to the statutes of the balance of the account of said Guthrie bank with the defendant, as shown on the books of the defendant, as the same would be affected by the substitution by defendant of Chas. E. Billingsley's note for $25,000.00 dated November 23, 1903, in lieu of the note of Chas. E. Billingsley of $30,000, dated September 9, 1903.

19th. On December 7th, 1903, the note for $25,000 was credited to the "special" or "No. 2" account of the Guthrie bank on the books of the Kansas City bank.

20th. On December 12th, 1903, S. W. Jurden, President of defendant, wrote and sent by mail to Chas. E. Billingsley, the following letter:

"CITY NATIONAL BANK,
KANSAS CITY, MO., *Dec.* 12, 1903.

Charles E. Billingsley, Esq., Guthrie, O. T.

DEAR MR. BILLINGSLEY: In looking over your letter of November 24th, in reference to the $25,000, special deposit, I notice you failed to sign the letter officially, but signed the note Pt. I think you made a mistake in not signing the letter officially and leaving the note stand with your individual name on it. I know it was your intention Mr. Billingsley to have the note signed individually and the letter officially, so I enclose the letter for you to add pt. to your signature, and you can instruct us to erase the word Pt. from the note. I know this is exactly what you wanted and thought I had better call your attention to it while it was fresh in my mind. Kindly add Pt. to the enclosed letter and return it to us.

Very truly yours, S. W. JURDEN, *President.*"

Enclosed and sent therewith was the letter hereinbefore set forth, which letter was in words and figures as follows:

29

CAPITOL NATIONAL BANK,
GUTHRIE, OKLA., *November* 23, 1903.

James G. Strean, Esq., Cashier, City National Bank, Kansas City, Mo.

DEAR SIR: Herewith find enclosed my demand note for $25,000, bearing interest at the rate of 5% per annum from date, please place the proceeds of this note as a special deposit to the credit of the Capitol National Bank of Guthrie, Okla. It being expressly understood and agreed that this fund is not subject to check, but is to remain with the City National Bank for the payment of this note, and you are hereby authorized to charge this note to said account at any time you desire.

Very truly yours, CHAS. E. BILLINGSLEY."

21st. On December 15th, 1903, Chas. E. Billingsley, wrote and sent by mail the following letter:

"CAPITOL NATIONAL BANK,
GUTHRIE, OKLA., *Dec.* 15, 1903.

S. W. Jurden, Pres., City National Bank, Kansas City, Mo.

DEAR SIR: I am in receipt of your favor of the 12th all of which I note and will say that I believe the cigars are on me. I hand you herewith my letter of Nov. 23, signed 'president,' and I would thank you to kindly cancel the signature of President on my Note of $25,000, making it read Chas. E. Billingsley, instead of President.

Thanking you for calling my attention to this matter and regret-

ting the trouble I have put you to and assuring you I will furnish the cigars the first time I am in Kansas City, beg to remain,

Yours Truly, CHAS. E. BILLINGSLEY, *President.*"

And he enclosed therewith the letter of November 23, 1903, described in the preceding finding, after having on that day added thereto after his signature, the letters "prest."

22nd. The account "special" or "No. 2" on the books of defendant with the Guthrie bank, after being debited with $30,250, on November 9th, 1903, remained unchanged until November 28th, 1903, when it was credited with interest in the amount of $19.73. As found above it received a credit on December 7th, 1903, of $25,000.00, and thereafter remained unchanged until December 31, 1903. It received a credit on December 31, 1903 of $28.49; on January 29, 1904, of $42.14; on February 27, 1904, of 42.30, and on March 29, 1904, of $39.56. These credits represent interest at two per cent. per annum allowed by defendant upon the bank's balance conforming to its general practice of allowing two per cent. on bank balances. So that, said account on the morning of April 4th, 1904, showed a credit balance in favor of said Guthrie bank of $24,994.54. No other debits or credits than those hereinbefore recited were made on said account prior to April 4th, 1904. There was at all times referred to herein but one account on the books of the Guthrie bank with the defendant, and that was its general account. And between September 9th, 1903, and April 4th, 1904, the proceeds of the two notes hereinbefore referred to, the first for $30,000 and the second for $25,000, were kept by the Guthrie Bank in said general account in the regular course of business.

23rd. Between September, 1903 and February, 1904, the Kansas City bank transmitted monthly statements of the general account of the Guthrie bank with the Kansas City bank, showing the deposits and checks. These accounts were rendered at the end of each month and showed the deposits and checks for the preceding months. Like statements were made by the Kansas City bank and transmitted to the Guthrie bank showing the transactions and entries of each credit and interest allowed in the "special" or "No. 2" account. Upon receipt of these accounts by the Guthrie bank, entry was made in the reconcilement book of the total thereof specifying the two accounts, sometimes designating the general account as "No. 1" and the special account as "No. 2" and in which reconcilement book was entered the balances in each of these respective accounts, and when there was any discrepancy between the accounts upon the books of the Kansas City bank and those upon the Guthrie bank notation was made and correspondence took place concerning such corrections, in accordance with which corrections were made by the bank in which the error was found to have occurred. The reconcilement book of the Guthrie bank was one of the books kept in the bank for that purpose and was a permanent record of such reconcilements of accounts. For the purpose of reconciling the accounts the Guthrie bank, after it had examined the statements of account sent to it by the Kansas City bank, would return upon a blank for that purpose

a statement showing the balances of either debit or credit in the general and special accounts, the heading to which blanks and statements and the statements of such general balances made and sent for the months of November, December and January, were as follows:

31 "To the City National Bank,
Kansas City, Mo.,
Your account rendered to Nov. 1-'03
showing a balance
$85543.82 Reg.
——— due us, agrees with our books except
30072.33 Spl as noted below.
Respectfully yours,
CHAS. E. BILLINGSLEY, *Pt.*

"To the City National Bank,
Kansas City, Mo.,
Your account rendered to Dec. (1)
showing a balance
No. 1 $114529.06 Reg.
——— due us, agrees with our books
157.95 except you Spl. as noted below.
Respectfully yours,
G. A. NELSON, *Cashier.*

"To the City National Bank,
Kansas City, Mo.,
Your account rendered to Feby. 1st
showing a balance
$49420.48 Reg.
——— due us, agrees with our books except
$24912.68 Spl. as noted below.
Respectfully yours,
R. S. BRIGGS,
Asst. Cashier."

This manner of reconcilement was kept up to February 1, 1903, after which date daily reconcilements were made.

24th. On April 4th, 1904, at about ten o'clock in the forenoon the Kansas City bank charged to the "special" or "No. 2" account of the Guthrie bank, upon its books, the sum of $25,000. to pay the note of Chas. E. Billingsley of that amount hereinbefore set forth. No corresponding entry was made on the books of the Guthrie bank. And on that day S. W. Jurden, President of the Kansas City Bank. wrote and mailed to Chas. E. Billingsley, Esq., President, a letter enclosing the $25,000. Billingsley note "duly cancelled." The letter is as follows:

KANSAS CITY, Mo., *April 4th*, '04.

Chas. E. Billingsley, Esq., Pt., Guthrie, O. T.

DEAR SIR: We to-day charged your account with $25,013.90 being amount of your note of Nov. 23 and accrued interest to date. This is in conformity with our letter of Nov. 23rd. Enclosed please find note duly cancelled.

Very truly yours,

S. W. JURDEN, *President.*

32 When this note was charged to the "special" or "No. 2" account on the books of the Kansas City bank with the Guthrie bank, the said Kansas City bank did not at that time nor at any time previous have any knowledge that the Guthrie bank was in a failing condition.

25th. On April 4th, 1904, about 2 P. M. and two hours before the termination of banking hours according to the custom of the banks in Guthrie, Okla., the said Guthrie bank closed its doors and ceased to do business, and Myron R. Sturtevant the Bank Examiner, acting under the authority of the Comptroller of the Currency, took possession thereof as Receiver. This Receivership has continued until this date, the plaintiff herein having thereafter, sometime in the month of April, been appointed Receiver. At that date said Guthrie bank was insolvent, and its liabilities exceeded its assets by four hundred thousand or five hundred thousand dollars.

And on April 11, 1904, Myron R. Sturtevant, then being the Receiver of the Guthrie bank, and the predecessor of the plaintiff herein, telegraphed to the City National bank as follows:

"Confirmation of Telegram from Capitol National Bank, Guthrie, Okla. Paid April 11, 1904. City National Bank, Kansas City, Mo. Twenty-five thousand dollar note is not liability of this bank. We hold you. Myron R. Stertevant, Receiver Capitol National Bank."

And thereafter, on June 7th, 1904, the said note of Chas. E. Billingsley for $25,000, therein referred to, was by the attorneys for the Receiver tendered and returned to the Kansas City bank, and thereafter on the next day, June 8th, 1904, said note was returned by the Kansas City bank to said attorneys.

26th. Charles E. Billingsley was insolvent at all the times mentioned in the plaintiff's petition herein.

27th. There was no other contract or writing between Chas. E. Billingsley or the Guthrie bank, and defendant relative to the making of the notes for $30,000 and $25,000 hereinbefore referred to, and the transactions in reference thereto, than those contained in the correspondence hereinbefore set out, and the entire transactions were conducted and consummated by the written correspondence and the entries on the books hereinbefore referred to.

33 28th. From January, 1902, until the failure of the Guthrie bank, that bank pursued two methods of borrowing money:

First: By issuing its certificates of deposit payable either to Chas. E. Billingsley, or others, and causing such certificates of deposit to

be negotiated and delivered to banks, upon negotiation of which credit would be taken in the account current of the Guthrie bank, with the bank from which such loan was made.

Second: By issuing the notes of the bank and crediting the proceeds in the personal account of Charles E. Billingsley in the Guthrie bank, upon which, as payments were made upon such loans so credited to such account, checks would be made, reciting therein payment, or part payment, of the particular loan for which the check was drawn, and such checks were signed, either by Billingsley or in the name of Billingsley by the Cashier, G. A. Nelson. The personal account of Billingsley was also used for entering therein his private deposits and for paying his personal checks.

The following is a statement of some of the loans of the latter class:

The Guthrie bank on May 23, 1903, borrowed $100,000.00 of the Mechanics National Bank of St. Louis upon its promissory note of that date, executed in its own name by its president, due ninety days thereafter, with its notes as collateral security of the aggregate face value of $192,827.93; the proceeds of which loan were on May 24, 1903, credited on the books of said Guthrie bank to the personal account of Chas. E. Billingsley, although the money was borrowed for and was at all times the money and property of said bank and was not the money or property of said Chas. E. Billingsley, and the said money so borrowed or credit therefor did not otherwise appear on the books of said Guthrie bank than as a credit in the account of said Chas. E. Billingsley.

The said Guthrie bank on July 8, 1903, borrowed $20,000. of the Merchants Loan & Trust Company of Chicago, upon its promissory note of that date, executed in its own name by its President and Cashier, due sixty days after date with its sundry bonds as collateral securities; the proceeds of which loan were on July 22, 1903, credited on the books of the Guthrie bank to the personal account of Chas. E. Billingsley, although the money so borrowed was at all times the money and property of said bank, and was not the money or property of said Chas. E. Billingsley, and the said money so bor-
34 rowed or credit therefor, did not otherwise appear on the books of said Guthrie bank than as a credit in the account of said Chas. E. Billingsley. Prior to September 9th, 1903, there had been paid upon the foregoing loans the sum of $14,225., by checks on said Guthrie bank signed by Chas. E. Billingsley, and the said credit to his account reduced by that amount; so that, on September 9, 1903, and for sometime thereafter the said personal account of said Chas. E. Billingsley stood credited by reason of the unpaid balance of said loans, that is, by reason of the bank's said asset shown to his credit, in the sum of $105,775.00. The said personal account of said Chas. E. Billingsley showed a nominal credit at that time, namely; on or about September 9, 1903, of $85,007.21; whereas if the amount of the bank asset represented by said loans hereinbefore mentioned were taken from the said account it would have shown an overdraft of $20,767.79.

On November 9, 1903, the said loan of the Merchants Loan &

Trust Company had been wholly paid off, and the said loan of the Mechanics National Bank of St. Louis has been reduced by payments made by checks of Chas. E. Billingsley, which were charged to his said personal account to $73,000.00, and on that date, namely: Nov. 9th, 1903, and for and during the entire month of November, including November 30th, 1903, the said personal account of said Chas. E. Billingsley showed a nominal credit of $49,352.92; whereas if the amount of the bank's asset represented by the unpaid balance of the said loans were taken from the said account it would have shown an overdraft during the whole of said month of November, 1903, of $20,647.08. The loans herein referred to were paid off prior to April 4th, 1904.

The Guthrie bank upon its note signed in its own name by its President, dated January 29, 1904, payable four months after date, secured by various notes, warrants and stocks as collaterals, borrowed of the Lafayette Bank of St. Louis the sum of $100,000., and upon its note signed in its own name by the President, dated March 30th, 1904, payable four months after date, secured by its various collateral notes, borrowed of the State National Bank of Fort Worth, Texas, the sum of $20,000., the proceeds of which loans were on February 5th, 1904, credited on the books of said Guthrie bank to the personal account of Chas. E. Billingsly, although the money so borrowed was at all times the money and property of said bank, and was not the property of money of said Chas. E. Billingsley, and the said money so borrowed or credit therefor, did not otherwise appear on the books of said Guthrie Bank than as a credit in the account
35 of Chas. E. Billingsley. Prior to April 4th, 1904, there had been paid on said loans the sum of $3125.00 by checks signed Chas. E. Billingsley, and the credit to his account reduced by that amount, so that on April 4th, 1904 there was in the said personal account of Chas. E. Billingsley, of the funds or credit belonging to said bank the sum of $116,875. The said personal account of Chas. E. Billingsley showed a nominal credit on April 4th, 1904 of $84,886.33, whereas if the amount of the said bank's assets represented by said loans mentioned in this finding were taken from said account it would have shown on that date an overdraft of $33,988.67. The unpaid balance of said notes namely—$116,875 was paid off by the Receiver of said bank after he assumed charge of its assets.

There were other loans of this class, in respect of one of which there was entered upon the books of the Guthrie bank, being Balance Journal K, page 48, the following: "Mer. L. & T. Chi. Note, C. E. B., 19.800" "Mer. L. & T. Chi." meant Merchants Loan & Trust Company, Chicago, Illinois, and "C. E. B." meant Chas. E Billingsley, and the note referred to was a note of Chas. E. Billingsley. The amount of the note was $20,000., the difference between the amount of the note and the above entry was the discount.

29th. There were no other loans made or owing in whole or in part between November 1st, 1903, and April 4th, 1904, than the loans particularly described in the preceding findings, and if the credit standing in the personal account of Chas. E. Billingsley on the books of said Guthrie bank by reason of the money so borrowed

by said bank, being carried on the books of said bank, to the credit of said account, be eliminated therefrom, then said account of Chas. E. Billingsley would show an overdraft during all the period from November 1st, 1903 to April 4th, 1904, of at least $20,000, and the amount of that overdraft on April 4th, 1904, was $33,988.67, no part of which has ever been paid to said Guthrie Bank or the Receiver therefor.

30th. When the money was obtained upon a note the proceeds were carried to the personal account of Billingsley in the Guthrie bank, and as payments were made upon such loans, or as they were paid, checks would be drawn upon that account in payment. This course of business made it so that there was no Bills Payable Account in the Guthrie bank.

31st. In reference to a prior loan of the Guthrie Bank from the Kansas City bank, the following correspondence took place:

36 "CAPITOL NATIONAL BANK,
GUTHRIE, OKLA., *Feb.* 26, 1903.

J. G. Strean, Cashier, City National Bank, Kansas City, Mo.

DEAR SIR: I sent you to day under separate cover remittance of $25,000. Kindly credit our account with this amount and oblige I will leave this with you until my paper is due, and the day it is due, kindly charge to my account and forward to me.

I appreciate the accommodation very much Friend Strean, and assure you as soon as I can get the matter straightened out we will open an account with you.

Trusting this remittance will meet with your approval and with kind personal regards, I beg to remain,

Yours truly, CHAS. E. BILLINGSLEY, *President.*

CAPITOL NATIONAL BANK,
GUTHRIE, OKLA., *May* 15, 1903.

J. G. Strean, Cashier, City National Bank, Kansas City, Mo.

DEAR SIR: I herewith hand you certificate of deposit No. 1429 for $25,000 with collateral notes attached, amounting to $31,396.19. I would thank you to kindly credit our account with $25,000, for thirty days less the interest. We have had some very heavy demands on us at this time, and thought I would give you a chance to make a little money along with us.

Trusting this will meet with your approval, and with kind personal regards,

Yours truly, CHAS. E. BILLINGSLEY, *President.*"

And the following account existed upon the books of the Kansas City bank, a statement of which was rendered to the Guthrie bank:

Capitol Nat'l Bank, Guthrie, in Account with City National Bank of Kansas City, Kansas City, Mo.

19		Dr. Feb'y 1903.	Dr.	Cr.	
10	St. Louis	24000	3	Use Chas E Billings.	24839.58
28	Bal	25839.58	27	26	25000
					49839.58"

The above transaction is the one referred to in the letter and finding No. 4 herein, in the language: "I have handled this before in this way in our old K. C. account, so suppose it will be all O. K."

37 Upon this account interest was credited in a separate statement. The loan noted on the account "Use Chas. E. Billings-24839.58" was handled in the Guthrie bank upon tickets which are as follows:

"Debit City Natl. Bank, Kansas City, 24839.58
Feb. 4, 1903.
"Debit D & Int. Billingsley
Feb. 4, 1903. 160.42

and went to the credit of C. E. Billingsley in his private account upon the following deposit slip:

Deposited with

Capitol National Bank.

By C. E. Billingsley,
Guthrie, Okla., Feb. 4, 1903.
Please list each check separately.

Currency,	Dollars.	Cents.
Silver,		
Gold,		
Checks as follows:		
	25,000.	
Total--		

See that all checks and drafts are endorsed."

And this loan was paid by check upon the private account of Chas. E. Billingsley. And concerning this loan the following correspondence took place:

"KANSAS CITY, MO., *Feb.* 3, 1903.

Capitol National Bank, Guthrie, Okla.

GENTLEMEN: We have this day credited the account of the Capitol National Bank, Guthrie, for use of Chas. E. Billingsley, 24,839.58.

Very truly yours, J. G. STREAN, *Cashier.*

KANSAS CITY, Mo., *Feb.* 3, 1903.

Chas. E. Billingsley, Esq., Guthrie, Okla.

DEAR SIR: Enclosed please find carbon copy of the list of bonds you left with us as collateral to your note.

Very truly yours, J. G. STREAN, *Cashier.*

KANSAS CITY, Mo., *Feb.* 27, 1903.

Chas. E. Billingsley, Esq., Guthrie, Okla.

DEAR MR. BILLINGSLEY: Your letter of the 26th received, also remittance for $25,000. which we have placed to your credit, and I assure you it has been a pleasure for us to grant you this
38 accommodation, and whenever we can serve you again, it will be a pleasure for us to do so. On maturity of the note we will charge same up to your account and return same to you with collateral, unless you instruct us otherwise. I hope Friend Billingsley you will soon be able to give us a steady account. You will find that we will treat you right at all times.

Very truly yours, J. G. STREAN, *Cashier.*"

Stamped: "Answered March 3, 1903, by Chas. E. Billingsley."

MAR. 3, 1903.

J. G. Strean, Cashier City National Bank, Kansas City, Mo.

DEAR SIR: I am in receipt of yours of the 27th and assure you I appreciate the same very much indeed, and assure you Friend Strean as soon as I possibly can will see that you get an account from the Capitol National.

Again thanking you I beg to remain,

Yours truly, ——— ———, *President.*"

KANSAS CITY, Mo., 3-7-1903.

Chas. E. Billingsley, President, Guthrie, Okla.

DEAR SIR: We this day charge your account your note of $25000 as per your letter of recent date, and encolse same herein cancelled as we sent you the collateral at your request a few days ago, and trust this is satisfactory.

Kindly acknowledge receipt of bonds we sent, and oblige,

Very truly yours, J. G. STREAN, *Cashier.*"

Stamped: "Answered March 9, 1903, by Chas. E. Billingsley."

32nd. The City National Bank allowed interest at the rate of two per cent. per annum upon the amount deposited in the "Special" or "No. 2" account and charged interest at rate of five per cent. on the $30,000. and the $25,000 notes. As to the $30,000 note, credits and charges of all interest allowed and charged were made in the special account. With respect to interest on the $25000 note the following letters passed between the Kansas City bank and the Guthrie bank:

"CITY NATIONAL BANK,
KANSAS CITY, MO., *Dec.* 29, '03.

C. E. Billingsley, Guthrie, Okla.

DEAR SIR: Interest on your demand note of $25,000 to December 31 is $139.40. Kindly have check for this reach us not later
39 than December 31st, as we wish to close our year's business on that date.

Your prompt compliance will greatly oblige,
Very truly yours, J. G. STREAN, *Cashier.*"

"CAPITOL NATIONAL BANK,
GUTHRIE, OKLA., *Jan.* 9, 1904.

J. G. Strean, Cashier City National Bank, Kansas City, Mo.

DEAR SIR: Replying to your favor of the 29th relative to interest on demand note of $25000, $139.40, for which Mr. Billingsley gave you check, I wish you would kindly inform me how you figured this interest, as I am unable to make figures agree with yours, and would thank you to do this at your earliest possible convenience as I wish to make the necessary tickets here.

With personal regards,
Yours truly, G. A. NELSON, *Cashier.*"

The $25,000 note shows endorsements of two payments of interest. Under date of February 13, 1904, G. A. Nelson, Cashier of the Guthrie bank, wrote the following debit ticket:

"Debit D & Int. Billingsley K. C. $139.40
Feb. 13, 1904."

And on March 26, 1904, the amount of this ticket was charged to the interest account of the Guthrie bank by saying "Billingsley $139.40" and credit was given for that amount to the Kansas City bank.

This was a payment by the Guthrie bank of interest on the $25,000 note in the above amount to the Kansas City bank.

33rd. The manner of conducting the business of the Guthrie bank in respect to borrowing money upon certificates of deposit was substantially as indicated upon one of the certificates, of which the following is a copy with endorsements thereon:

CNB
United States
Depository.

Savings Department.

The Capitol National Bank. No. 1429.

GUTHRIE, OKLA., *May 15th,* 1905.

This certifies that Chas. E. Billingsley has deposited in this bank, $25000.00
12360.

12640.

40 Twenty five thousand and no/100 dollars,
Payable in current — to himself on return of this certificate properly endorsed.

R. S. BRIGGS,
Ass't Cashier.

Not subject to check.
Not over Twenty-six thousand $26000."
Stamped on face: "Aug. 5, 1903, Capitol National Bank, Mail Teller Guthrie, Okla. Paid, Aug. 5, 1903, Capitol National Bank, Guthrie, O. T. Teller."
Perforated: "Paid."
Indorsed on back: "Chas. E. Billingsley, $13,360.00 Paid 7/27/1903."

The loans negotiated by such certificates of deposit appeared on the books of the Guthrie bank as a liability on account of deposits.
34th. The course of business pursued by the President of the Guthrie bank was known to the other officers of the bank.

Conclusions of Law.

1st. That the plaintiff is not entitled to recover herein.
2nd. That the Defendant is entitled to judgment for its costs and disbursements in this behalf expended.
Let Judgment be entered accordingly.
By the Court,
(Signed) PAGE MORRIS, *Judge.*

It is now, therefore, considered and adjudged that the plaintiff is not entitled to recover in this action and that the plaintiff take nothing upon his petition herein filed, and that the defendant have and recover from plaintiff herein its costs and disbursements in this behalf expended, to be taxed by the clerk, and that proper process of this court be, and is hereby awarded to enforce the payment thereof. To which judgment and findings of facts and conclusion of law the plaintiff excepted and now here notes such exceptions.
It is further ordered that plaintiff have fifty days within which to prepare and file a bill of exceptions.

On the 26th day of April, A. D. 1905, the following entry appears of record:

2893.

J. A. WILLOUGHBY, Receiver,
vs.
THE CITY NATIONAL BANK OF KANSAS CITY.

This day comes plaintiff and files motion to correct & supplement the finding of facts herein.

41 Afterwards on the 27th day of April, A. D. 1905, a motion for a new trial was filed.

Afterwards, to wit on the 13th day of May, A. D. 1905, the following entry appears of record:

2893.

J. A. WILLOUGHBY, Receiver,
vs.
CITY NATIONAL BANK OF KANSAS CITY, MO.

Now on this day the following amended finding of facts is filed and ordered to be recorded:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City, November Term, 1904.

(No. 2893.)

J. A. WILLOUGHBY, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, Plaintiff,
vs.
CITY NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendant.

In the above entitled action the plaintiff having moved to correct and supplement the Findings of Fact, heretofore entered, and the Court having heard said motion on written memoranda filed by plaintiff and defendant, and being fully advised in the premises,

It is hereby Ordered:

1st. That the 8th Finding be amended as follows: Strike out the last two paragraphs of said finding, and in lieu thereof insert the following:

"Upon the receipt of the check of Charles E. Billingsley, dated September 8th, 1903, above set forth, a credit ticket was made by the Guthrie bank in words and figures as follows:

Credit B./R	
No. 8762	10 000
9991	10 000
8763	10 000
Sep. 8, 1903	30 000

An- entries in the column headed "When Paid" were made Sept. 9th, 1903, on the discount register of that bank opposite the record of the items of discount there recorded, as follows:

42 August 8, 1903.

		Date of Item.		Date Time.	Dis. face, c't'd int.	When paid.
8762	Mo. Kans. & Okla. Co. C. E. V. P...	6- 8-03	60	6- 8-03	10 000	9-9-03
8763	Wild West Show Co. C. E. B. Treas.	6- 8-03	60	6- 8-03	10 000	9-9-03

October 29, 1903.

991	Western Horse Co.....	7-29-03	..	7-29-03	10 000	9-9-03

These promissory notes, Nos. 8762, 8763 and 9991, are the ones hereinbefore referred to as having been objected to by the Bank Examiner on his examination made on the first day of September, 1903. They were taken out of the assets and from the possession of the Guthrie bank, and are not now in said assets, and it does not appear what has become of them."

2nd. That the 22nd Finding be amended as follows: Strike out the last two sentences of said finding, and in lieu thereof insert the following:

There was at all times referred to herein but one account on the books of the Guthrie Bank with the defendant, and that was its general account; and between September 9th, 1903, and April 4th, 1904, the credit balances shown by the "special" or "No. 2" account in favor of the Guthrie bank on the books of the defendant were carried by the Guthrie bank in said general account."

3rd. That the 23rd finding be amended so as to read as follows:

"Between September, 1903, and February, 1904, the Kansas City bank transmitted monthly statements of the general account of the Guthrie bank with the Kansas City bank showing the deposits and checks. These accounts were rendered at the end of each month and showed the deposits and checks for the preceding month. Like statements were made by the Kansas City bank and transmitted to the Guthrie bank, showing the entries of each item of credit and interest allowed or charged in the "special" or "No. 2" account. Upon receipt of these accounts by the Guthrie bank entry was made in the reconcilement book of the totals thereof, specifying the two accounts, sometimes designating the general account as "No. 1" and the special account as "No. 2" and in which reconcilement book were entered the balances in each of these respective accounts, and when there was any discrepancy between the accounts upon
43 the books of the Kansas City bank and those of the Guthrie bank notation was made and correspondence took place concerning such corrections, in accordance with which corrections were made by the bank in which the error was found to have occurred. The reconcilement book of the Guthrie bank was one of the books kept in the bank for that purpose and was a permanent record of such reconcilements of accounts. For the purpose of reconciling the accounts the Guthrie bank after it had examined the statements of account sent to it by the Kansas City bank would return upon a blank for that purpose a statement showing the balances of either debit or credit in the general and special accounts.

Such monthly reconcilements were made up to February 1st, 1904, and after that date daily reconcilements were made."

4th. That the 28th Finding be amended as follows: Strike out the third paragraph thereof, reading as follows:

"The following is a statement of some of the loans of the latter class," and insert in lieu thereof: "The following will show the course of business as to loans of the latter class." And, strike out the last paragraph of said finding and insert in lieu thereof the following:

"In respect of one of the foregoing loans, to-wit, the one from the Merchants Loan & Trust Company, Chicago, Illinois, there was entered upon one of the books of the Guthrie bank, being Balance Journal K, page 48, the following: "Mer. L. & T. Chi. Note, C. E. B., 19,800." Mer. L. & T. Chi." meant Merchants Loan & Trust Company, Chicago, Illinois, and "C. E. B." meant Chas. E. Billingsley and the note referred to was a note of the Capitol National Bank, of Guthrie, Okla., by Chas. E. Billingsley, Prest., and G. A. Nelson, Cashier. The amount of the note was $20,000., and the difference between the amount of the note and the above entry was the discount."

By the Court,
(Signed) PAGE MORRIS, *Judge.*
May 10, 1905.

Afterwards, on the 2nd day of June, A. D. 1905, the following entries appear of record:

2893.

J. A. WILLOUGHBY, Recvr.,
vs.
CITY NATIONAL BANK OF KANSAS CITY.

This day comes plaintiff by his attorneys and by leave of Court files motion in arrest of judgment.

44 2893.

J. A. WILLOUGHBY, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, Plaintiff,
vs.
THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendant.

Order.

Now comes the plaintiff and files an assignment of errors herein and a petition for a writ of error herein, together with an order from the Honorable Comptroller of the Currency of the United States to the plaintiff in this cause to prosecute a writ of error herein, and it is hereby ordered upon motion of W. C. Scarritt, Esquire, Attorney for plaintiff that a writ of error be and is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Eighth Circuit the judgment heretofore entered herein, and it appearing that the Honorable Comptroller of the Currency of the United States has directed that a writ of error herein be prosecuted it is ordered that all further proceedings herein be suspended and stayed until the determination of the said writ of error by the United States Circuit Court of Appeals for the Eighth Circuit.

The Petition for Writ of Error filed on June 2, 1905, is in words and figures as follows:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2893.

J. A. WILLOUGHBY, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, Plaintiff,

vs.

THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendant.

Petition for Writ of Error.

J. A. Willoughby, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, the plaintiff in the above entitled cause, feeling himself aggrieved by the findings and judgment of the court entered herein on the 24th day of April, 1905, comes now by his attorneys of record herein and by direction of the Honorable Comptroller of the Currency, and petitions the said Court for an order allowing said plaintiff to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Eighth Circuit under and according to the laws of the United States in that behalf made and provided, and for an order that all further proceedings herein be suspended and stayed until the determination of the said writ of error by the United States Court of Ap-
45 peals for the Eighth Circuit and in support of this petition files herewith the order of the Honorable Comptroller of the Currency directing the prosecution of a writ of error as here prayed, and your petitioner will ever pray.

FLYNN AND AMES AND
SCARRITT, GRIFFIN & JONES,
Attorneys for Plaintiff.

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2893.

J. A. WILLOUGHBY, Receiver of the Capitol National Bank of Guthrie, Oklahoma, Plaintiff,

vs.

CITY NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendant.

To J. A. Willoughby, Receiver of the Capitol National Bank of Guthrie, Oklahoma:

You are hereby directed by the Comptroller of the Currency to prosecute a writ of error from the judgment rendered on or about April 24th, 1905, by the Circuit Court of the Western Division of

the Western District of Missouri, in the above entitled cause, to the United States Circuit Court of Appeals for the Eighth Circuit.

WM. B. RIDGELY,
Comptroller of the Currency.

The Assignment of Errors filed June 2, 1905, is in words and figures as follows:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2893.

J. A. WILLOUGHBY, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, Plaintiff,
vs.
THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendant.

Assignment of Errors.

Comes now J. A. Willoughby, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, plaintiff herein and files the following assignment of errors, upon which he will rely in his prosecution of the Writ of Error in the above entitled cause.

I.

That the United States Circuit Court for the Western Division of the Western District of Missouri erred in rendering judgment
46 against the plaintiff in said cause and in favor of the defendant upon the pleadings and the facts as found by the court in said cause, and that said judgment is contrary to the law and the facts as found by the court in said cause.

II.

That the said court erred in refusing to give at the trial of said cause the following instruction or declaration of law requested by the plaintiff: "The Court declares the law to be that upon the pleadings and proofs the finding and judgment should be for the plaintiff upon the first count in the petition."

III.

That the said court erred in refusing to give at the trial of said cause the following instruction or declaration of law requested by the plaintiff: "The Court declares the law to be that upon the pleadings and proofs the finding and judgment should be for the plaintiff upon the second count in the petition."

IV.

That the said court erred in refusing to give at the trial of said cause the following instruction or declaration of law requested by

the plaintiff: "The Court declares the law to be that upon the pleadings and proofs the finding and judgment should be for the plaintiff upon the third count in the petition."

V.

That the said court erred in refusing to give at the trial of said cause the following instruction or declaration of law requested by the plaintiff: "The Court declares the law to be that the loan or loans made by the defendant to Charles E. Billingsley upon his notes dated September 9th, 1903, for $30,000.00, and November 23rd, 1903, for $25,000.00, respectively, was the indebtedness of the said Charles E. Billingsley and was not the indebtedness of the Capitol National Bank, and that the said Charles E. Billingsley although he may have been at the time such loans were made president of the Capitol National Bank was without authority to authorize the defendant to charge the said loan or loans to the account of the said Capitol National Bank with the defendant, or to authorize the defendant to charge said loan or loans against any fund of the said Capitol National Bank in the possession or under the control of the defendant."

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VI.

That the said court erred in refusing to give at the trial of said cause the following instruction or declaration of law requested by the plaintiff: "The Court declares the law to be that the loan or loans made by the defendant to Charles E. Billingsley upon his notes dated September 9th, 1903, for $30,000.00 and November 23rd, 1903, for $25,000.00 respectively, was the indebtedness of the said Charles E. Billingsley and was not the indebtedness of the Capitol National Bank and that neither the cashier, assistant cashier nor any or all of the book-keepers of said Capitol National Bank were authorized on the part of the said Capitol National Bank to charge the said loan or loans or to cause them to be charged against any fund or account of the said Capitol National Bank."

VII.

That the said Court erred in making and entering the following conclusion or declaration of law upon the facts as found by the said court: namely: "That the plaintiff is not entitled to recover herein."

VIII.

That the said court erred in making and entering the following conclusion or declaration of law upon the facts as found by the said court namely: "That the defendant is entitled to judgment for its costs and disbursements in its behalf expended."

IX.

That the said court erred in not rendering judgment in favor of the plaintiff and against the defendant upon the first count of the petition upon the facts as found by the said court.

X.

That the said court erred in not rendering judgment in favor of the plaintiff and against the defendant upon the second count of the petition upon the facts as found by the said court.

48 XI.

That the said court erred in not rendering judgment in favor of the plaintiff and against the defendant upon the third count of the petition upon the facts as found by the said court.

XII.

That the said court erred in overruling the plaintiff's motion for a new trial and his motion in arrest of judgment.

Wherefore the said A. J. Willoughby, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, as the plaintiff in error, prays that the judgment of the Circuit Court of the United States for the Western Division of the Western District of Missouri be reversed and that this court render judgment herein in favor of the plaintiff according to the prayer of his petition or that the said Circuit Court be directed to grant a new trial of said cause.

FLYNN AND AMES AND
SCARRITT, GRIFFITH & JONES,
Attorneys for Plaintiff in Error.

Afterwards, to wit on the 8th day of June, 1905, the following entry appears of record:—

2893.

J. A. WILLOUGHBY, Receiver,
vs.
THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI.

The following order was this day filed and ordered to be recorded:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2893.

J. A. WILLOGHBY, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, Plaintiff,
vs.
THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendant.

Now on this June 2nd, 1905, the plaintiff's motion for new trial and the motion in arrest of judgment herein having been submitted to the Court, and the Court having considered said motions, doth overrule said motions and each of them; to which action of the

Court in overruling said motions and each of them the plaintiff at the time duly excepted and still excepts, which exceptions are by the court overruled. And the plaintiff having tendered his bill
49 of exceptions herein, and it appearing that the same has been approved by the attorneys of the defendant and it appearing to the Court that the said bill of exceptions is correct in all respects it is hereby settled, allowed and approved as a true bill of exceptions in this case, and the same is now and here certified by the undersigned Judge of this Court who presided at the trial of this cause and the said bill of exceptions when so certified shall be filed by the clerk of this court.

(Signed) PAGE MORRIS, *Judge.*

The bill of exceptions filed June 8, 1905, is in words and figures as follows:—

In the Circuit Court of the United States for the Western Division of the Western District of Missouri, at Kansas City, November Term, 1904.

No. 2893.

J. A. WILLOUGHBY, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, Plaintiff,

vs.

CITY NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendant.

Bill of Exceptions.

Be it remembered that on December 21, 1904 and at the November Term, 1904, of the United States Circuit Court for the Western Division of the Western District of Missouri at Kansas City the above entitled cause coming on to be heard before the Honorable Page Morris, Judge of said court, the plaintiff appearing by his attorneys Messrs. Flynn & Ames and Messrs. Scarritt, Griffith & Jones through Mr. C. B. Ames and Mr. W. C. Scarritt, and the defendant appearing by its attorneys Messrs. Milton Moore, and Eaton & Loomis, through Mr. Milton Moore, Mr. John A. Eaton and Mr. C. A. Loomis, the following proceedings were had:

The parties to the said cause made, executed and filed in this cause a written stipulation waiving a jury; which said stipulation, omitting caption, is in words and figures as follows:

"It is hereby stipulated by and between the parties to the above entitled cause that a trial by jury of this cause is hereby waived and that the cause shall be tried by the Court without a jury. Flynn & Ames, Scarritt, Griffith & Jones, Attorneys for the Plaintiff. Milton Moore, Eaton & Loomis, Attorneys for the Defendant."

50 On the back thereof is the following:

"No. 2893. J. A. Willoughby, Receiver, *vs.* City National Bank. Stipulation Waiving Jury. Filed Dec. 21, 1904. Adelaide Utter, Clerk."

And thereupon both plaintiff and defendant by their respective attorneys requested the Court to make and enter a finding of fact herein.

And thereupon the plaintiff introduced evidence on his behalf, and the defendant introduced evidence on its behalf, and the evidence so introduced tended to support the findings of fact made and entered by the Honorable Page Morris, Judge of the said court, in this cause, as the said findings of fact appear of record in said cause.

And at the conclusion of the introduction of evidence the plaintiff requested the Court to give the following declaration or conclusions of law, and each of them:

"1. The Court declares the law to be that upon the pleadings and proofs the finding and judgment should be for the plaintiff upon the first count in the petition.

2. The Court declares the law to be that upon the pleadings and proofs the finding and judgment should be for the plaintiff upon the second count in the petition.

3. The Court declares the law to be that upon the pleadings and proofs the finding and judgment should be for the plaintiff upon the third count in the petition.

4. The Court declares the law to be that the loan or loans made by the defendant to Charles E. Billingsley upon his notes dated September 9th, 1903 for $30,000.00 and November 23rd, 1903 for $25,000.00 respectively, was the indebtedness of the said Charles E. Billingsley and was not the indebtedness of the Capitol National Bank, and that the said Charles E. Billingsley, although he may have been at the time such loans were made, president of the Capitol National Bank was without authority to authorize the defendant to charge the said loan or loans to the account of the said Capitol National Bank with the defendant, or to authorize the defendant to charge said loan or loans against any fund of the said Capitol National Bank in the possession or under the control of the defendant.

5. The Court declares the law to be that the loan or loans made by the defendant to Charles E. Billingsley upon his notes dated September 9th, 1903 for $30,000.00 and November 23rd, 1903 for $25,000.00 respectively, was the indebtedness of the said
51 Charles E. Billingsley and was not the indebtedness of the Capitol National Bank and that neither the cashier, assistant cashier, nor any or all of the bookkeepers of said Capitol National Bank were authorized on the part of the said Capitol National Bank to charge the said loan or loans or to cause them to be charged against any fund or account of the said Capitol National Bank."

And thereupon the said cause was by the parties submitted to the Court, and was by the Court taken under advisement.

And thereafter, to-wit, on April 24th, 1905 the Court refused to grant each of the declarations or conclusions of law hereinbefore set out requested by the plaintiff. To which action of the Court in refusing to give said declarations or conclusions of law and each of them the plaintiff at the time duly excepted and still excepts.

Thereupon on the same day the court made and entered his Findings of Fact herein.

And thereupon the Court made and entered in this cause the following conclusions of law:

"First. That the plaintiff is not entitled to recover herein.

Second. That the defendant is entitled to judgment for its costs and disbursements in this behalf expended."

To which action of the Court in giving, making and entering the said conclusions of law, and each of them, the plaintiff at the time duly excepted and still excepts.

And on April 24th, 1905 the plaintiff by order of court duly made and entered was allowed fifty days from this date within which to file his Bill of Exceptions herein.

Thereupon on April 26th, 1905, the plaintiff filed in this cause a motion to Correct and Supplement the Findings of Fact made and entered by the Court herein; which said motion is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2893.

J. A. WILLOUGHBY, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, Plaintiff,

vs.

THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendant.

Motion to Correct and Supplement Findings of Fact.

Now comes the plaintiff and moves the court to correct and supplement the Findings of Fact made by the court and filed herein, in the following respects:

52 1. In Finding 8th it is recited: "The Guthrie Bank made the credit ticket charging off the above notes on September 8, 1903." No other reference is made in the findings to the date of that transaction other than in the recital just quoted. The entire transaction is in writing and the books of the Capitol National Bank show conclusively that the entries relative to this transaction were not had or made in those books until September 9, 1903, and neither the credit ticket referred to, nor the entries on the books of the Capitol National Bank show the three $10,000 notes to have been "charged off". The book entries show those notes were paid. In the printed record pages 65 to 68 appears the following:

"By Mr. Scarritt: Q. I hand you Exhibit 22 and ask you to tell the court what that is? A. That is a copy of the Discount Register for the year 1903 of the Capitol National Bank.

Said paper marked Exhibit "22" is in the words and figures following, to-wit:

EXHIBIT "22."

AUGUST 8, 1903.

		Date of Item.	Time.	Date disc'td.	Face.	When paid.
8762	Mo. Kans. & Okla. Co., C. E. B. V. P.	6- 8-03	60	6-8-03	10000	9-9-03
8763	Wild West Show Co. C. E. B. Treas.	6- 8-03	60	6-8-03	10000	9-9-03
	October 29, 1903.					
9991	Western Horse Co.	7-29-03	..	7-29-03	10000DD	9-9-03"

Q. Will you state to the court, if you please, Mr. Selsor, what those items which I have read,—what the transaction indicated by the three items I have read was? In other words what do they mean?

A. These are notes each one payable to the Capitol National Bank; discounted by the bank; and show they were discounted on the days indicated; and the three of them were paid on the 9th of September, 1903.

Q. You were the bookkeeper in the bank at that time, you say?

A. Yes sir.

Q. Exhibit '23' I call your attention to that Exhibit. State to the court what it is.

A. That is a check on the Capitol National Bank, Guthrie, Oklahoma,—dated Guthrie, Okla., Sept. 8th, 1903, payable to 'Bank,' for Thirty Thousand Dollars,—signed by Chas. E. Billingsley.

Q. Is that the signature of Chas. E. Billingsley?

A. Yes sir.

Mr. SCARRITT: We offer that exhibit, together with the rubber stamp across the face, in evidence.

53 Said paper, marked Exhibit "23" was read in evidence and is in the words and figures following, to-wit:

GUTHRIE, OKLA., *Sept.* 8, 1903.

The Capitol National Bank, Pay to Bank or bearer $30000.00 Thirty Thousand no/100 Dollars.

CHAS. E. BILLINGSLEY.

Stamped across the face of said check, with rubber stamp, is the following: "Capitol Nat. Bank, Paid, Sept. 9, 1903. Teller. Guthrie, O. T."

(By Mr. SCARRITT:)

Q. I now hand you Exhibit "24" and ask you to tell the court what that document is.

A. That is a credit ticket crediting Bills Receivable Account with the bank with the three notes, #8762 for $10,000; #9991 for $10,000; #8763 for $10,000.

Q. Are those the same items referred to in the Discount Register, already in evidence?

A. I think so. This refers to the discount number.

Q. Is that Exhibit "24" one of the files from the banking house of the Capitol National Bank?

A. Yes sir.
Q. Made in the usual course of its business?
A. Yes sir.
Mr. SCARRITT: We offer this paper in evidence.
Said paper, marked Exhibit "24" is in the words and figures following, to-wit:

'Credit B/R

#8762	10,000
9991	10,000
8763	10,000
Sept. 8, 1903.	30,000.00'

(By Mr. SCARRITT:)

Q. You may state if you please, what connection in the conduct of the business of that Bank did that slip have with the check of Chas. E. Billingsley, marked Exhibit '23' and introduced in evidence? (Being the check set out in Finding 8).
A. The check was given to take up those three notes.
Q. Do you mean, to pay off those three notes?
A. Yes sir,—to take them out of the assets of the Bank.
Q. Were the three notes described on the credit ticket marked Exhibit '24' and on your discount Register, which is in evidence, marked Exhibit '22' the property of the Capitol National Bank prior to their payment?
A. Yes sir. It so shows on the books.
Q. After this transaction of September 9th, 1903, did they, to your knowledge, thereafter, appear among the assets of the Capitol National Bank of Guthrie, Oklahoma?
A. No sir."

54 The plaintiff therefore asks the court to strike from its findings the words heretofore quoted and in lieu thereof insert the following:

"A credit ticket was made under the date of September 8th, 1903 by the Guthrie Bank upon the receipt of the check of Charles E. Billingsley, dated September 8th, 1903 for $30,000 but no entries on the books of that bank were made relative to that transaction until September 9th, 1903, when the entries under the caption "When Paid" were made on the Discount Register of that bank opposite the record of the items of discount there recorded:

		Date of Item.	Time.	Date disc'td.	Face.	When paid.
8762	Mo. Kans. & Okla. Co., C. E. B. V. P.	6- 8-03	60	6- 8-03	10000	9-9-03
8763	Wild West Show Co., C. E. B. Treas.	6- 8-03	60	6- 8-03	10000	9-9-03
9991	Western Horse Co.	7-29-03	..	7-29-03	10000	9-9-03

Plaintiff states that the finding of the court herein complained of is not a full finding of the transaction purporting to be recited and is a misleading statement of one of the essential facts of this controversy.

2. In Finding 22nd it is recited: "And between September 9, 1903 and April 4, 1904, the proceeds of the two notes hereinbefore referred to, the first for $30,000 and the second for $25,000 were kept by the Guthrie Bank in said general account in the regular course of business."

Plaintiff requests the court to modify the foregoing recital by striking therefrom the words, "the proceeds of the two notes hereinbefore referred to, the first for $30,000, and the second for $25,000; and substitute therefor the words, "The credit balances shown on defendant's books in favor of the Guthrie Bank by "Account No. 2" or "Special Account." For the reason that the expression complained of is not an accurate recital of the facts shown in the proof, nor does it conform to the specific facts found by the court in other findings. In other findings it clearly appears that the Guthrie Bank got the credit of $30,000, which it kept in its general account in the regular course of business under and by virtue of the personal check of Charles E. Billingsley, for $30,000, upon the defendant bank, dated September 8th, 1903 set out in Finding 7th.

3. In Finding 23rd the letters "REG" after the figures $85,543.82, and the letters "SPL" after the figures $30,072.33, are not in the record, nor are those words after the figures $49,420.48 and $24,912.68 respectively, to be found in the record, and the record does not warrant the jumbling up of the sentences referred to as to make them unintelligible, and the plaintiff asks that these recitals be made to conform to the facts relative thereto, which are clearly shown by the original documents which are in evidence and are truly copied in the record.

4. In Finding 28th in the second paragraph thereof is the following recital: "The following is a statement of some of the loans of the latter class."

The plaintiff requests that the recital just quoted be modified so as to read as follows: "The following is a statement of all the current or pending loans of the Guthrie Bank during the period beginning September 1st, 1903 and ending with the close of the bank's business on April 4th, 1904" for the reason that the latter statement conforms to the indisputable fact, and plaintiff deems it essential to show the actual state of the personal account of Charles E. Billingsley with the Guthrie Bank during the period involved in this controversy.

5. Plaintiff prays that the following paragraph, being the last in Finding 28th, be stricken out:

"There were other loans of this class, in respect of one of which there was entered upon the books of the Guthrie Bank, being Balance Journal K, Page 48, the following: 'Mer. L. & T. Chi. Note, C. E. B., 19,800.' 'Mer. L. & T. Chi.' meant Merchants Loan & Trust Company Chicago, Illinois, and C. E. B. meant Chas. E. Billingsley, and the note referred to was a note of Chas. E. Billingsley. The amount of the note was $20.000, the difference between the amount of the note and the above entry was the discount."

For the reason that this recital is erroneous and misleading. The loan therein referred to is not another loan, but is the same

loan of the Guthrie Bank of $20,000 specifically referred to in the same finding beginning with the words, "The said Guthrie Bank on July 8, 1903 borrowed $20,000 of the Merchants Loan and Trust Company of Chicago, upon its promissory note," etc. This is directly and specifically shown by the record. See Exhibit 35, Record p. 117, Exhibits 46 to 50, inclusive, pages 135 to 139, inclusive, page 391.

That the loan of $20,000 referred to in Balance Journal K page 48 of Merchants Loan & Trust Company of Chicago is the identical loan with reference to which a specific finding is made by the court in Finding 28th and that it was the loan made upon the note of the Capitol National of Guthrie, Oklahoma and not upon the personal note of Charles E. Billingsley, does not admit of the possibility of a doubt. The note itself is in evidence. Exhibit 126, set out on page 391 of the record, and is signed, "The Capitol National Bank of Guthrie, Oklahoma, By Chas. E. Billingsley, Pres't. G. A. Nelson, Cash."

56 The recitation here criticised and which your Honor found at the request of defendant's counsel was doubtless intended to be founded on the testimony contained on page 161 of the record, and one or two questions preceding that page. The substance of that testimony is as follows:

"Q. (By Mr. Eaton to Mr. Selsor:) This is page 48 of 'Balance Journal K' of your bank,—the Capitol National Bank?
A. Yes sir.
Q. Now I will ask you to read the entry there?
A. (reading): 'Mer. L. & T., Chi.—Note C. E. B.—$19800.00.'
Q. What is 'Mer. L. & T.,—Chi.' What does that mean?
A. Merchants Loan and Trust Co., Chicago, Ills.
Q. And 'Note' that is under the head of 'Item' isn't it?
A. Yes sir.
Q. And 'C. E. B.' what does that stand for?
A. Chas. E. Billingsley.
Q. That means Chas. E. Billingsley's note,—does it not?
A. Either that, or a credit to his account.
Q. Is this a credit, on this book here?
A. This is a charge to this bank.
Q. A charge to the Chicago Bank?
A. Yes sir.
Q. Now that is another one of this same kind of loans?
A. That one you refer to is one of those four."

This witness by the words "those four" referred to the four loans represented by Exhibits 33, 34, 35 and 36 being respectively the $20,000 loan of the State National Bank of Ft. Worth. (Record p. 111); the $100,000 loan of the Lafayette Bank of St. Louis, Record p. 113); the $20,000 loan of the Merchants Loan & Trust Company of Chicago, (Record pp. 117, 391) and the $100,000 loan of the Merchants Bank of St. Louis, (Record pp. 118, 119).

That the note referred to in the criticised finding is one of those four notes is expressly shown to have been conceded by Mr. Eaton

at the trial. The testimony of Mr. Selsor heretofore quoted is continued on page 161 of the record, thus:

Q. And that amount went to the credit of Billingsley's account the same way as the other transaction.

A. $20000.00 went to the credit of his account; and $200.00 charged to the bank's "Interest and Discount."

(By COURT:)

Q. In other words, that $200.00 is charged to 'Interest and Discount,' and $19800.00 was charged to that bank in Chicago and $20000.00, to balance it, was credited to C. E. Billingsley?

A. Yes sir.

(By Mr. EATON:)

Q. And where is this same entry in the blotter,—with re-
57 ference to the four other loans? This is one of the loans that Mr. Scarritt called your attention to,—the $20000.00 loan."

The inquiries by Mr. Scarritt to this witness, shown at the bottom of page 116 and page 117 of the record, show conclusively that counsel for defendant understood and knew that the item referred to in Balance Journal K, page 48 was the $20,000 loan made by the Capitol National Bank of Guthrie of the Merchants' Loan & Trust Company of Chicago, specifically described in the court's finding No. 28.

Wherefore plaintiff prays that the court correct the findings made and filed herein so as to conform to the truth.

FLYNN AND AMES AND
SCARRITT, GRIFFITH & JONES,
Attorneys for Plaintiff.

Delivered copy of above motion this April 26th, 1905, to Messrs. Eaton & Loomis.

HOWARD NEWTON.

Which said motion to correct and supplement Findings of Fact was by the parties to this cause submitted to the Court, and thereupon on May 10th, 1905, the Court made and entered upon said motion an order in words and figures as follows:

In the Circuit Court of the United States for the Western Division of Missouri, at Kansas City. November Term, 1904.

No. 2893.

J. A. WILLOUGHBY, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory,

vs.

CITY NATIONAL BANK OF KANSAS CITY, MISSOURI.

In the above entitled action the plaintiff having moved to correct and supplement the Findings of Fact heretofore entered, and the

court having heard said motion on written memoranda filed by plaintiff and defendant, and being fully advised in the premises,

It is hereby ordered

1st. That the 8th finding be amended as follows: Strike out the last two paragraphs of said finding, and in lieu thereof insert the following:

"Upon the receipt of the check of Charles E. Billingsley dated September 8th, 1903, above set forth, a credit ticket was made by the Guthrie bank in words and figures as follows:

58 Credit B/R

No. 8762	10 000
9991	10 000
8763	10 000
Sept. 8, 1903.	30 000

And entries in the column headed "When Paid" were made September 9th, 1903, on the discount register of that bank opposite the record of the items of discount there recorded, as follows:

August 8, 1903.

		Date of item.	Time.	Date disct.	Face int.	When paid.
8762	Mo. Kans. & Okla. Co. C. E. B. V. P.	6- 8-03	60	6- 8-03	10000	9-9-03
8763	Wild West Show Co. C. E. B. Treas.	6- 8-03	60	6- 8-03	10000	9-9-03

October 29, 1903.

9991	Western Horse Co	7-29-03	..	7-29-03	10000	D 9-9-03

These promissory notes, Nos. 8762, 8763 and 9991 are the ones hereinbefore referred to as having been objected to by the Bank Examiner on his examination made on the first day of September, 1903. They were taken out of the assets and from the possession of the Guthrie bank, and are not now in said assets, and it does not appear what has become of them."

2nd. That the 22nd Finding be amended as follows: Strike out the last two sentences of said finding and in lieu thereof insert the following:

"There was at all times referred to herein but one account on the books of the Guthrie Bank with the defendant, and that was its general account, and between September 9th, 1903, and April 4th, 1904, the credit balances shown by the special or "No. 2" account in favor of the Guthrie Bank on the books of the defendant were carried by the Guthrie Bank in said general account."

3rd. That the 23rd Finding be amended so as to read as follows:

"Between September, 1903, and February, 1904, the Kansas City bank transmitted monthly statements of the general account of the Guthrie bank with the Kansas City bank showing the deposits and checks. These accounts were rendered at the end of each month and showed the deposits and checks for the preceding month. Like statements were made by the Kansas City bank and transmitted to the

59 Guthrie bank, showing the entries of each item and credit and interest allowed or charged in the "Special" or "No. 2" account. Upon the receipt of these accounts by the Guthrie bank entry was made in the reconcilement book of the totals thereof, specifying the two accounts, sometimes designating the general account as "No. 1," and the special account as "No. 2" and in which reconcilement book were entered the balances in each of these respective accounts, and when there was any discrepancy between the accounts upon the books of the Kansas City bank and those of the Guthrie bank notation was made and correspondence took place concerning such corrections, in accordance with which corrections were made by the bank in which the error was found to have occurred. The reconcilement book of the Guthrie bank was one of the books kept in the bank for that purpose and was a permanent record of such reconcilement of accounts. For the purpose of reconciling the accounts the Guthrie bank after it had examined the statements of account sent to it by the Kansas City bank would return upon a blank for that purpose a statement showing the balances of either debit or credit in the general and special accounts.

Such monthly reconcilements were made up to February 1st, 1904, and after that date daily reconcilements were made."

4th. That the 28th Finding be amended as follows: Strike out the third paragraph thereof, reading as follows:

"The following is a statement of some of the loans of the latter class," and insert in lieu thereof: "The following will show the course of business as to loans of the latter class." And strike out the last paragraph of said finding and insert in lieu thereof the following:

"In respect of one of the foregoing loans, to-wit, the one from the Merchants Loan & Trust Company, Chicago, Illinois, there was entered upon one of the books of the Guthrie bank, being Balance Journal K, page 48 the following: "Mer. L. & T. Chi. Note, C. E. B., 19 800." "Mer. L. & T. Chi." meant Merchants Loan & Trust Company, Chicago, Illinois, and "C. E. B." meant Chas. E. Billingsley and the note referred to was a note of the Capitol National Bank of Guthrie, Okla., by Chas. E. Billingsley, Pres., and G. A. Nelson, Cashier. The amount of the not was $20,000, and the difference between the amount of the note and the above entry was the discount."

By the Court
(Signed) PAGE MORRIS, *Judge.*

May 10, 1905.

The Eighth Finding of Fact as amended by the said order is in words and figures as follows:

60 "8th. On September 9th, 1903, the Guthrie Bank received the personal check of Charles E. Billingsley, which is in words and figures as follows:

'GUTHRIE, OKLA., *Sept.* 8, 1903.

The Capitol National Bank. Pay to bank or bearer $30,000.00 Thirty Thousand Dollars and no/100 dollars.

CHAS. E. BILLINGSLEY.'

Stamped across face of said check with rubber stamp, is the following: 'Capitol Nat. Bank, Paid, Sept. 9, 1903, Teller, Guthrie, O. T.' This check was charged to the personal account of Charles E. Billingsley upon the books of the Guthrie Bank, and the same amount was credited to the Bills Receivable account on the books of said bank, and there were taken up or charged out of the assets of the said bank three promissory notes then owned by said bank, described as follows:

One note No. 8762, dated June 8th, 1903, due sixty days thereafter, for $10,000, made by the Missouri, Kansas & Oklahoma Company. This note had been discounted by the Guthrie Bank in the regular course of business on June 8th, 1903.

One note No. 8763 dated June 8th, 1903, due sixty days thereafter, for $10,000 made by the Wild West Show Company. This note had been discounted by the Guthrie Bank in the regular course of business on June 8th, 1903. The two notes last described were written and signed by Chas. E. Billingsley, as Treasurer and Vice-President of the makers, and the proceeds of their discount were credited on the books of the Guthrie Bank to the account of the St. Louis & San Francisco Railroad Company and the Wild West Show Company in the sums of $15,749.75 and $4250.25, respectively, both of whom were customers of and each kept an ordinary bank account with the Guthrie Bank at that time, and on that date before said credits the St. Louis & San Francisco Railroad Company's account was overdrawn $15,759.75 and the Wild West Shows Co.'s account was overdrawn $2234.07.

One note No. 9991, dated July 29th, 1903, due ninety days thereafter, for $10.000 was made by the Western Horse Show Company. This note had been discounted by the Guthrie Bank in the regular course of business on July 29th, 1903, and the proceeds of that discount credited on its books to the account of W. D. Fossett, who was a customer of and kept an ordinary bank account with the Guthrie Bank at that time, and which account on that date, before said credit, was overdrawn $5871.12.

61 Upon the receipt of the check of Charles E. Billingsley, dated September 8th, 1903, above set forth, a credit ticket was made by the Guthrie bank in words and figures as follows:

Credit	B/R	
	#8762.....	10 000
	9991.....	10 000
	8763.....	10 000
		30 000

Sept. 8, 1903.

And entries in the column headed 'When Paid' were made September 9th, 1903, on the discount register of that bank opposite the record of the items of discount there recorded, as follows:

August 8, 1903.

		Date of item.	Time.	Date disc't'd.	Face int.	When paid.
8762	Mo. Kans. & Okla. Co., C. E. B. V. P.	6- 8-03	60	6- 8-03	10000	9-9-03
8763	Wild West Show Co., C. E. B. Treas.	6- 8-03	60	6- 8-03	10000	9-9-03

October 29, 1903.

9991	Western Horse Co.....	7-29-03	..	7-29-03	10000D	9-9-03

AUGUST 8, 1903.

These promissory notes, Nos. 8762, 8763 and 9991, are the ones hereinbefore referred to as having been objected to by the Bank Examiner on his examination made on the first day of September, 1903.

They were taken out of the assets and from the possession of the Guthrie bank, and are not now in said assets, and it does not appear what has become of them."

The Twenty-second Finding of Fact as amended by said order is as follows:

"22nd. The account 'special' or 'No. 2' on the books of defendant with the Guthrie bank, after being debited with $30,250 on November 9th, 1903, remained unchanged until November 28th, 1903 when it was credited with interest in the amount of $19.73. As found above it received a credit on December 7th, 1903 of $25,000.00 and thereafter remained unchanged until December 31st, 1903. It received a credit on December 31, 1903 of $28.49; on January 29, 1904 of $42.14; on February 27, 1904 of 42.30 and on March 29 1904 of $39.56. These credits represent interest at two per cent. per annum allowed by defendant upon the bank's balance, conforming to its general practice of allowing two per cent. on bank balances. So that, said account on the morning of April 4th, 1904, showed a credit balance in favor of said Guthrie Bank of $24,994.54.

62 No other debits or credits than these hereinbefore recited were made on said account prior to April 4th, 1904. There was at all times referred to herein but one account on the books of the Guthrie bank with the defendant, and that was its general account; and between Sept. 9, 1903 and April 4, 1904, the credit balances shown by the "Special" or "No. 2" account in favor of the Guthrie Bank on the books of defendant were carried by the Guthrie bank in said general account."

The Twenty-third Finding of Fact as amended by said order is as follows:

23rd. Between September, 1903, and February, 1904, the Kansas City bank transmitted monthly statements of the general account of the Guthrie bank with the Kansas City bank, showing the deposits and checks. These accounts were rendered at the end of each month and showed the deposits and checks for the preceding months. Like

statements were made by the Kansas City bank and transmitted to the Guthrie Bank showing each item of credit and interest allowed or charged in the 'special' or 'No. 2' account. Upon receipt of these accounts by the Guthrie bank, entry was made in the reconcilement book of the totals thereof specifying the two accounts, sometimes designating the general account as "No. 1" and the special account as "No. 2" and in which reconcilement book was entered the balances in each of these respective accounts, and when there was any discrepancy between the accounts upon the books of the Kansas City bank and those upon the Guthrie bank notation was made and correspondence took place concerning such corrections, in accordance with which corrections were made by the bank in which the error was found to have occurred. The reconcilement book of the Guthrie bank was one of the books kept in the bank for that purpose and was a permanent record of such reconcilements of accounts. For the purpose of reconciling the accounts the Guthrie bank, after it had examined the statements of account sent to it by the Kansas City bank would return upon a blank for that purpose a statement showing the balances of either debit or credit in the general and special accounts. Such monthly reconcilements were made up to February 1, 1904 and after that date daily reconcilements were made."

The Twenty-eighth Finding of Fact as amended by said order is as follows:

"28th. From January 1902, until the failure of the Guthrie bank, that bank pursued two methods of borrowing money:

63 First: By issuing its certificates of deposit payable either to Chas. E. Billingsley, or others, and causing such certificates of deposit to be negotiated and delivered to banks, upon negotiation of which credit would be taken in the account current of the Guthrie bank with the bank from which such loan was made.

Second: By issuing the notes of the bank and crediting the proceeds in the personal account of Charles E. Billingsley in the Guthrie bank, upon which, as payments were made upon such loans so credited to such account, checks would be made, reciting therein payment, or part payment, of the particular loan for which the check was drawn, and such checks were signed, either by Billingsley, on in the name of Billingsley by the cashier, G. A. Nelson. The personal account of Billingsley was also used for entering therein his private deposits and for paying his personal checks.

The following will show the course of business as to loans of the latter class:

The Guthrie bank on May 23, 1903, borrowed $10000.00 of the Mechanics National Bank of St. Louis upon its promissory note of that date, executed in its own name by its president, due ninety days thereafter, with its notes as collateral security of the aggregate face value of $192,827.93; the proceeds of which loan were on May 24, 1903, credited on the books of said Guthrie bank to the personal account of Chas. E. Billingsley, although the money was borrowed for and was at all times the money and property of said bank, and was not the money or property of said Chas. E. Billingsley, and the said

money so borrowed or credit therefor did not otherwise appear on the books of said Guthrie bank than as a credit in the account of said Chas. E. Billingsley.

The said Guthrie bank on July 8, 1903 borrowed $20,000 of the Merchants Loan & Trust Company of Chicago, upon its promissory notes of that date, executed in its own name by its President and Cashier, due sixty days after date with its sundry bonds as collateral securities; the proceeds of which loan were on July 22, 1903, credited on the books of the Guthrie bank to the personal account of Chas. E. Billingsley, although the money so borrowed was at all times the money and property of said bank, and was not the money or property of said Charles E. Billingsley, and the said money so borrowed or credit therefor did not otherwise appear on the books of said Guthrie bank than as a credit in the account of said Charles E. Billingsley. Prior to September 9th, 1903, there had been paid upon the foregoing loans the sum of $14,225, by checks on said
64 Guthrie Bank signed by Charles E. Billingsley, and the said credit to his account reduced by that amount; so that on September 9th, 1903, and for sometime thereafter the said personal account of said Charles E. Billingsley stood credited by reason of the unpaid balance of said loans, that is by reason of the banks' said asset shown to his credit, in the sum of $105,775.00. The said personal account of said Charles E. Billingsley showed a nominal credit at that time, namely: on or about September 9th, 1903, of $85,007.21; whereas if the amount of the bank asset represented by said loans hereinbefore mentioned were taken from the said account it would have shown an overdraft of $20,767.79.

On November 9th, 1903, the said loan of the Merchants Loan & Trust Company had been wholly paid off, and the said loan of the Mechanics National Bank of St. Louis had been reduced by payments made by checks of Charles E. Billingsley, which were charged to his said personal account to $73,000.00; and on that date, namely, November 9th, 1903, and for and during the entire month of November, including November 30th, 1903, the said personal account of said Charles E. Billingsley showed a nominal credit of $49,352.92; whereas if the amount of the bank's asset represented by the unpaid balance of the said loans were taken from the said account it would have shown an overdraft during the whole of said month of November, 1903, of $20,647.08. The loans herein referred to were paid off prior to April 4th, 1904.

The Guthrie bank upon its note signed in its own name by its President, dated January 29, 1904, payable four months after date, secured by various notes, warrants and stocks as collateral, borrowed of the Lafayette Bank of St. Louis the sum of $100,000, and upon its note signed in its own name by the President, dated March 30th, 1904, payable four months after date, secured by its various collateral notes, borrowed of the State National Bank of Fort Worth, Texas, the sum of $20,000, the proceeds of which loans were on February 5th, 1904, credited on the books of said Guthrie bank to the personal account of Chas. E. Billingsley, although the money so borrowed was at all times the money and property of said bank, and was

not the property or money of said Chas. E. Billingsley, and the same money so borrowed or credit therefor, did not otherwise appear on the books of said Guthrie Bank than as a credit in the account of Chas. E. Billingsley. Prior to April 4th, 1904, there had been paid on said loans the sum of $3125.00 by checks signed Chas. E. Billingsley, and the credit to his account reduced by that amount, so that on April 4th, 1904, there was in the said personal account of Chas. E. Billingsley of the funds or credit belonging to said bank the sum of $116,875. The said personal account of Chas. E. Billingsley showed a nominal credit on April 4th, 1904, of $84,886.33, whereas if the amount of the said bank's asset represented by said loans mentioned in this finding were taken from said account it would have shown on that date an over-draft of $33,988.67. The unpaid balance of said notes, namely—$116,875 was paid off by the Receiver of said bank after he assumed charge of its assets.

In respect of one of the foregoing loans,—to-wit, the one from the Merchants Loan & Trust Co., Chicago, Illinois, there was entered upon one of the books of the Guthrie bank, being Balance Journal K, page 48, the following: 'Mer. L. & T. Chi. Note, C. E. B., 19,800,' 'Mer. L. & T. Chi.' meant Merchants Loan & Trust Company, Chicago, Illinois, and 'C. E. B.' meant Chas. E. Billingsley, and the note referred to was a note of the Capitol National Bank of Guthrie, Okla., by Chas. E. Billingsley, Prest., and G. A. Nelson, Cash. The amount of the note was $20,000, and the difference between the amount of the note and the above entry was the discount."

And thereupon on April 27th, 1905, the plaintiff filed in said cause its Motion for a New Trial; which motion is in words and figures, as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2893.

J. A. WILLOUGHBY, Receiver of the Capitol National Bank of Guthrie, Oklahoma, Plaintiff,

vs.

THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendant.

Motion for New Trial.

Now comes the plaintiff and moves the court to set aside the finding and judgment heretofore entered in this cause, and to grant unto the plaintiff a new trial herein, for the following reasons:

1. The court erred in refusing to admit competent, material and relevant testimony offered by the plaintiff at the trial of this cause.

2. The court erred in admitting irrelevant, incompetent and

immaterial evidence on the part of the defendant at the trial of this cause over the objection of the plaintiff.

66 3. The court erred in refusing to give each and every one of the conclusions of law, or instructions, requested by the plaintiff at the trial of said cause, which said conclusions of law are numbered from 1 to 5, inclusive.

4. The court erred in making and entering of record each of the conclusions of law made and entered herein, that is to say, in the conclusion that the plaintiff is not entitled to recover herein and that the defendant is entitled to judgment for its costs and disbursements in this behalf expended.

5. The court erred in not making and entering a conclusion of law upon the facts as found by the court in favor of the plaintiff on the first count in the petition.

6. The court erred in not making and entering a conclusion of law upon the facts as found by the court in favor of the plaintiff on the second count in the petition.

7. The finding and judgment of the court upon the facts as found by the court and upon the entire record is erroneous in that the judgment is in favor of the defendant, and upon the entire record the judgment should have been in favor of the plaintiff and against the defendant.

8. The court erred in making and entering the Findings of Fact, and especially Findings numbered 8, 22 and 28, for the reason that they are not supported by the evidence and are against the evidence.

FLYNN AND AMES AND
SCARRITT, GRIFFITH & JONES,
Attorneys for Plaintiff.

Thereupon on June 2nd, 1905 the plaintiff filed in said cause its motion in arrest of judgment; which said motion is in words and figures as follows:

In the Circuit Court of the United States for the Western Division of the Western District of Missouri.

No. 2893.

J. A. WILLOUGHBY, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, Plaintiff,

vs.

CITY NATIONAL BANK OF KANSAS CITY, Defendant.

Motion in Arrest of Judgment.

Now comes the plaintiff in the above entitled cause and moves the court to arrest the judgment heretofore rendered and entered in this cause for the following reasons:

67 1. Because the judgment rendered and entered in said cause is upon the entire record herein, erroneous in form and in substance.

2. Because upon the entire record herein the judgment should have been in favor of the plaintiff and against the defendant, and the judgment as entered herein in favor of the defendant and against the plaintiff is erroneous, and contrary to law and the rights of the parties hereto.

FLYNN AND AMES AND
SCARRITT, GRIFFITH & JONES,
Attorneys for Plaintiff.

Which said motion for new trial and said motion in arrest of judgment were by the Court on June 2nd, 1905, overruled; to which action of the Court in overruling said motion for new trial and said motion in arrest, and each of them the plaintiff at the time duly excepted, and still excepts.

And now in furtherance of justice and that right may be done the plaintiff presents the foregoing as his Bill of Exceptions in this cause, and prays that the same may be settled, allowed, signed and certified by the Judge as provided by law.

FLYNN AND AMES AND
SCARRITT, GRIFFITH & JONES,
Attorneys for Plaintiff.

The foregoing Bill of Exceptions is correct in all respects and is hereby approved, allowed, settled and made a part of the record herein.

Done this June 2, 1905.

PAGE MORRIS,
Judge, Presiding at the Trial of said cause.

Memorandum.

Some of the findings which I have made in this case I do not consider essential to support the conclusions at which I have arrived, but I have made them because the facts therein found are shown by the evidence, and because they were submitted by counsel for one side or the other, and therefore seem to be considered by them material and important. I think it would be entirely sufficient to stop with the twenty-seventh finding.

The facts as found, I think, show that the transactions in reference to the two notes of thirty thousand dollars and twenty
68 five thousand dollars, respectively, were bank transactions, carried on on the part of the Guthrie bank by Billingsley, its President, and on the part of the Kansas City bank, by Strean, the Cashier, and Jurden, the President; that the Kansas City bank did not deal with Billingsley in reference to them as an individual, but as representing his bank, and not as for his personal benefit but for the benefit of his bank; that even if Billingsley himself expected to and did receive a personal benefit therefrom, by reason of his connection with the makers of two of the notes for ten thousand dollars each which were taken up or charged off, the Kansas City bank had no knowledge, nor was there anything to put it upon notice or in-

quiry, that he was to receive such personal benefit, the loan or credit having been given by the Kansas City bank to enable his bank to reduce excessive loans to the amount of thirty thousand dollars, and the Kansas City bank not knowing what the particular loans were.

The contract in reference to these two notes is found in the correspondence between Billingsley and Strean and Jurden. It was briefly and in substance, this: that the Kansas City bank should receive the personal note of Billingsley, and extend on its books in a special account a loan or credit to the Guthrie bank for the amount thereof, to enable the latter bank to reduce excessive loans. This loan or credit was not to be checked against, but the amount thereof was to be kept with the Kansas City bank in a special account, and as a special deposit, to protect the note, and as to the thirty thousand dollar note, the amount thereof to be charged to the special account when it matured, and as to the twenty five thousand dollars note, the amount thereof to be charged to the special account at any time the Kansas City bank might desire.

The Kansas City bank in charging up the notes to the special account acted in accordance with the terms of this contract, and it is clear that Billingsley, the President, and Nelson, the Cashier, so considered when the thirty thousand dollar note was charged to the special account. The contract was an entire one, and to allow the plaintiff to recover the amount of the special deposit would be to annul the contract which created it. The Kansas City bank has carried out that contract as it was made, and the plaintiff cannot now be heard to say that it will set aside one part of it and claim anything from another part.

I consider that the check given by Billingsley to the Guthrie bank on the Kansas City bank, and the entries made on the books of the two banks, were but steps towards carrying out the contract. They did not in any way change or annul it.

69 It may be proper to state that on the argument counsel for both sides stated, in answer to a question by the Court, that no contention was made that the contract was illegal because it was one which would enable the Guthrie bank, or Billingsley, its President to make a false showing of the condition of the bank to the Bank Examiner or Comptroller. And under the decision in Hanover National Bank *v.* First National Bank of Burlingame Kansas, 109 Fed. 421, no such contention could be made.

(Signed) PAGE MORRIS, *Judge.*

UNITED STATES OF AMERICA, *Set:*

I, Adelaide Utter, Clerk of the Circuit Court of the United States for the Western Division of the Western District of Missouri, do hereby certify that the above and foregoing is a full, true and complete copy of the record, bill of exceptions, assignment of errors, and all proceedings in the cause wherein J. A. Willoughby, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, is plaintiff and the City National Bank of Kansas City, Missouri, is defendant, as fully as the same appears on file and of record in my office.

Witness my hand as clerk and the seal of said Court. Done at office in Kansas City, Missouri, this 11th day of July, A. D. 1905.

[Seal of the United States Circuit Court Western Division for the Western District of Missouri.]

ADELAIDE UTTER, *Clerk.*

Filed Jul. 18, 1905. John D. Jordan, *Clerk.*

70 *(Appearance of Counsel for Plaintiff in Error.)*

And on the eighteenth day of July, A. D. 1905, the appearance of counsel for plaintiff in error was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Judicial Circuit, at St. Louis, in Vacation, July 17, 1905.

No. 2296.

J. A. WILLOUGHBY, Receiver of the Capitol National Bank of Oklahoma City, Plaintiff in Error.

vs.

THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendant in Error.

Appearance.

To the Clerk of the Court:

You will please enter my appearance as attorney and counsel for Plaintiff in Error in the above entitled cause.

W. C. SCARRITT.

(Endorsed:) No. 2296. J. A. Willoughby, Receiver of Capitol Nat'l. Bank, Plaintiff in error, *vs.* The City National Bank of K. C., Mo., Defendant in error. Appearance. Filed Jul. 18, 1905, John D. Jordan, Clerk. Scarritt, Griffith & Jones, Attorneys at Law, American Bank Building, Kansas City, Mo.

(Appearance of Counsel for Defendant in Error.)

And on the fifteenth day of September, A. D. 1905, the appearance of counsel for defendant in error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2296.

71 J. A. WILLOUGHBY, Receiver, etc., Plaintiff in Error,

vs.

THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI.

The Clerk will enter my appearance as Counsel for the Defendant in Error.

JOHN A. EATON,
CHAS. A. LOOMIS.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2296. J. A. Willoughby, Receiver, etc., Plff. in Error, *vs.* The City National Bank of Kansas City, Missouri. Appearance. Filed Sep. 15, 1905, John D. Jordan, Clerk. John A. Eaton, Charles A. Loomis, Counsel for Deft. in Error.

(Stipulation for Order substituting Charles T. Cherry, Receiver, etc., as Plaintiff in Error.)

And on the eleventh day of November, A. D. 1905, a stipulation for an order substituting Charles T. Cherry, Receiver, etc., as Plaintiff in Error, was filed in said cause, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Circuit.

No. 2296.

J. A. WILLOUGHBY, Receiver of the Capitol National Bank of Oklahoma Territory, Plaintiff in Error,

vs.

THE CITY NATIONAL BANK OF KANSAS CITY, Defendant in Error.

Stipulation.

It is hereby stipulated by the parties to the above entitled cause that since the allowance of the writ of error in the above entitled cause, J. A. Willoughby has resigned as receiver of The Capital National Bank of Guthrie, Oklahoma Territory and Charles
72 T. Cherry has been duly appointed and qualified as the successor of the said J. A. Willoughby as such receiver; and that Charles T. Cherry, Receiver of the Capital National Bank of Guthrie, Oklahoma Territory shall be substituted as plaintiff in error in this cause.

Kansas City, Missouri, October 19, 1905.

FLYNN & AMES &
W. C. SCARRITT,
Counsel for Plaintiff in Error.
EATON & LOOMIS,
Counsel for Defendant in Error.

(Endorsed:) No. 2296. J. A. Willoughby, Receiver, *vs.* The City National Bank of Kansas City. Stipulation for order substituting Charles T. Cherry, Receiver, etc., as Plff. in Error. Filed Nov. 11, 1905, John D. Jordan, Clerk. Scarritt, Griffith & Jones, Attorneys at Law, American Bank Building, Kansas City, Mo.

(Order Substituting Charles T. Cherry, Receiver, etc., as Plaintiff in Error.)

And on the thirteenth day of November, A. D. 1905, in the record of the proceedings of said Circuit Court of Appeals is an order substituting Charles T. Cherry, Receiver, etc., as Plaintiff in Error, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1905.

MONDAY, *November* 13, 1905.

No. 2296.

J. A. WILLOUGHBY, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, Plaintiff in Error,
vs.
THE CITY NATIONAL BANK OF KANSAS CITY.

In Error to the Circuit Court of the United States for the Western District of Missouri.

73 This cause came on this day to be heard upon the stipulation of the parties for the substitution of Charles T. Cherry, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, as Plaintiff in Error, in the place and stead of J. A. Willoughby, former Receiver, resigned.

On Consideration Whereof, and in pursuance of said stipulation, it is now here ordered by this Court, that Charles T. Cherry, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, be, and he is hereby substituted as Plaintiff in Error, in this cause, in the place and stead of J. A. Willoughby, as Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory.

November 13, 1905.

(*Appearance of Counsel for Plaintiff in Error.*)

And on the second day of January, A. D. 1906, the appearance of counsel for plaintiff in error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2296.

CHARLES T. CHERRY, Receiver, &c., Plaintiff in Error,
vs.
THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI.

The Clerk will enter my appearance as Counsel for the Plaintiff in Error.

CHARLES B. AMES.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2296. Charles T. Cherry, Receiver &c., Plaintiff in Error, *vs.* The City National Bank of Kansas City, Missouri. Appearance. Filed Jan. 2, 1906. John D. Jordan, Clerk. Charles B. Ames, Counsel for Plff. in Error.

74 (*Argument Commenced.*)

And on the second day of January, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is an entry in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1905.

TUESDAY, *January* 2, 1906.

No. 2296.

CHARLES T. CHERRY, Receiver, etc., Plaintiff in Error,
vs.
CITY NATIONAL BANK OF KANSAS CITY, MISSOURI.

In Error to the Circuit Court of the United States for the Western District of Missouri.

This cause having been called in its regular order, argument was commenced by Mr. Charles B. Ames in behalf of the plaintiff in error; continued by Mr. John A. Eaton and Mr. Charles A. Loomis for the defendant in error and by Mr. W. C. Scarritt for the plaintiff in error, but the arguments not having been concluded at the hour of adjournment, the further hearing of this cause was postponed until tomorrow morning.

(*Order of Submission.*)

And on the third day of January, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1905.

WEDNESDAY, *January* 3, 1906.

No. 2296.

CHARLES T. CHERRY, Receiver, etc., Plaintiff in Error,
vs.
CITY NATIONAL BANK OF KANSAS CITY, MISSOURI.

75 In Error to the Circuit Court of the United States for the Western District of Missouri.

This cause having been called this day for further hearing, argument was concluded by Mr. W. C. Scarritt for the plaintiff in error,

Thereupon this cause was submitted to the Court upon the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the fourth day of April, A. D. 1906, an opinion of said Circuit Court of Appeals was filed in said cause, in the words and figures following, to-wit:

76 United States Circuit Court of Appeals, Eighth Circuit.

No. 2296, December Term, A. D. 1905.

CHARLES T. CHERRY, Receiver, Substituted for J. A. Willoughby, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, Plaintiff in Error,

vs.

THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendant in Error.

In Error to the Circuit Court of the United States for the Western District of Missouri.

Mr. Charles B. Ames and Mr. W. C. Scarritt (Mr. Dennis T. Flynn was with them on the brief) for plaintiff in error.
Mr. Charles A. Loomis and Mr. John A. Eaton for defendant in error.

Before Sanborn, Hook and Adams, Circuit Judges.

ADAMS, Circuit Judge, delivered the opinion of the court:

This was a suit brought by the receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, plaintiff in error, against the City National Bank of Kansas City, Missouri, to recover money alleged to have been standing to the credit of the Guthrie Bank in the Kansas City Bank and by the latter unlawfully appropriated to the payment and satisfaction of personal notes held by it and made by one Billingsley, the president of the Guthrie Bank. A jury was duly waived. The court tried the action, made a special finding of facts and rendered judgment in favor of the defendant.

It appears that the business of the Guthrie Bank with defendant bank and others had for a long time been conducted and largely controlled by Billingsley, its president; that he had taken special charge of negotiating and making loans for his bank; that for nearly two years before the occurrence of the transaction involved in this case the Guthrie Bank had been a borrower of money, obtaining it by issuing and selling its certificates of indebtedness to other banks and taking credit therefor in account current with the banks buying them, and also by executing and selling its promissory notes. The

proceeds of all notes so negotiated were kept and handled by the bank in the individual name of its president. This was
77 done to obviate the appearance of a bills payable account.

Sometime before September, 1903, a National Bank examiner had made an examination of the Guthrie Bank and had condemned three certain loans, each for $10,000.00, as excessive within the meaning of Sec. 5200 of the Revised Statutes. Thereupon, on September 4, 1903, Billingsley wrote Mr. Strean, the cashier of defendant bank, the following letter:

CAPITOL NATIONAL BANK,
GUTHRIE, OKLA., *September* 4, 1903.

"FRIEND STREAN: My stenographer is not on deck, so you will have to try and read my scrawl. I want you to take my note of 30,000.00 and Cr. my Bank with like amount in a special account with the understanding that said account is not to be checked against. My reason for wanting this is that I have that amount of excessive loans that the Department is kicking about, and I will be unable to reduce them to limit for 3 or 4 months. But do not want make a discount and pay interest when it is not necessary. Will you do this for me? I have handled this before in this way with our old K. C. account, so suppose it will be all O. K. with you as you will not be out any money and loan and deposit will offset each other on your books. With kind regards and thanking you in anticipation, I am, as ever,

Your friend, CHAS. E. BILLINGSLEY."

By letter dated September 5, the cashier acknowledged receipt of Billingsley's letter, and informed him that his board was unwilling to accommodate him as requested, but inasmuch as his bank paid two per cent. on current balances it would have to charge Billingsley five per cent., the usual interest on the loan.

On September 8, Billingsley, as president of his bank, wrote and sent defendant bank the following letter:

CAPITOL NATIONAL BANK,
GUTHRIE, OKLA., *Sept.* 8, 1903.

"FRIEND STREAN: I am in receipt of yours of the 5th for which accept my thanks. I hand you herewith my note for 30 Th. at 60 days at 5% from date and have given the Capitol Natl. Bank check on you for like amount and it is agreed that said Capitol Natl. Bank is to keep this 30 Th. with you until note is retired together with as large a balance as possible. Again thanking you and with kind personal regards, I am,

Your friend, CHAS. E. BILLINGSLEY, *Prest.*"

The Guthrie Bank had for some time been keeping a large balance in its current account with the defendant bank. The note for $30,000.00 referred to in the correspondence was discounted as requested and its proceeds were placed to the credit of the Guthrie Bank in a second or special account, as contemplated by the cor-

respondence, not subject to check. At the end of each month and until the maturity of the note the Guthrie Bank was credited in the special account with two per cent. interest on the special deposit of $30,000.00, and at the maturity of the note, it, with interest at five per cent. per annum, was charged to the Guthrie Bank in this same account. This last charge absorbed the entire credits and somewhat more. Soon thereafter, another note for $25,000.00 was negotiated by Billingsley with defendant bank on practically the same terms and subject to the condition as expressed in the letter of Billingsley to the defendant, dated November 23, 1903, wherein, after notifying the defendant of the enclosure of his demand note for that sum, Billingsley said:

78

"Please place the proceeds of this note as a special deposit to the credit of the Capitol National Bank of Guthrie, Okla. It being expressly understood and agreed that this fund is not subject to check but is to remain with the City National Bank for the payment of this note, and you are hereby authorized to charge this note to said account at any time you desire."

Accordingly, the special account was credited with the proceeds of that note and with interest monthly thereafter, until April 4, the date of the failure of the bank, when the note, without interest, was charged against the account, entirely absorbing it.

It is for the return to the Guthrie Bank of these two sums of $30,000.00 and $25,000.00 that the receiver instituted this suit.

The Guthrie Bank kept in its books only one account with defendant bank, aggregating the amount of the general and special accounts kept by the defendant, but the reconcilement statements exchanged between the banks monthly, and sometimes daily, showed the existence of the special account in favor of the Guthrie Bank as forming a part of what its books treated as the general current account.

The Guthrie Bank also kept a book called its reconcilement book. This was one of its permanent records in which the special account was also recognized and treated as forming a part of the general account which its ledgers showed it kept in the defendant bank.

Some incorrect entries were first made in the books of the defendant bank arising from the fact that its cashier, with whom the transaction had been negotiated, was temporarily absent, but they were quickly corrected on his return and the special account was opened according to the agreement of the two banks. The check of Billingsley for $30,000.00 referred to in his letter of September 8 was duly honored and the amount ultimately charged to the general account of the Guthrie Bank and its proceeds, when received or made available at Guthrie, were employed in taking up or charging out the three excessive loans complained of by the examiner.

There is much detail of fact consisting of entries in the books of the bank stated in the special finding of the court, but it is not deemed necessary to complicate this opinion with such details. The ultimate facts are clear, showing that pursuant to the correspondence between the two banks the proceeds of Billingsley's two notes for $30,000.00 and $25,000.00 respectively, were entered to the

credit of the Guthrie Bank in the special account to meet the payments of the notes at maturity, and the fact is clear that at their maturity the proceeds of the notes were appropriated for that purpose and were never used for any other purpose.

79 By reason of the failure of the Guthrie Bank to recognize in its bookkeeping, the existence of the special account in the defendant bank, as separate from its general account there kept, the books of the Guthrie Bank at all times showed that it had a general credit in the defendant bank aggregating the amount of both the general and special accounts. This method of bookkeeping no doubt served the purpose which inspired it, to deceive the comptroller, or the bank examiner. The Guthrie Bank appeared to have, according to its books, at first, $30,000.00, and later $25,000.00 to its general credit in the defendant bank more than it really had. In this way the Guthrie Bank was able to get rid of its three obnoxious notes amounting to $30,000.00 apparently without disturbing its cash reserve and in a manner satisfactory to the bank examiner.

It is now well settled that the executive officers of National banks may legitimately, in the usual course of banking business, and without special authority from their boards of directors, rediscount their own discounts or otherwise borrow money for the bank's use. Auten *v.* United States National Bank, 174 U. S., 125, 141; Aldrich *v.* Chemical National Bank, 176 U. S. 618, 627; First National Bank of Huntington *v.* Arnold, 156 Ind. 494, 60 N. E., 137.

These cases distinguish Western National Bank *v.* Armstrong 152 U. S. 346, relied upon by the receiver's counsel, and show its inapplicability to the facts of the present case.

Two questions of fact are presented for our determination: first, did the defendant devote any money in its possession belonging to the Guthrie Bank to the payment of any indebtedness whatsoever? Second, if, so, was it used to pay the debt of the Guthrie Bank or for its benefit, or for the individual benefit of its president, Billingsley? The only moneys claimed to have been wrongfully appropriated by the defendant were the two items of $30,000.00 and $25,000.00 respectively, credited to the Guthrie Bank in the special account. Did those sums belong to the Guthrie Bank? In answering this question we must consider the substance of things rather than the form in which they are clothed; the actual purpose and agreement of the parties rather than the bookkeeping entries which might have been made by either party for ulterior purposes. In so doing we find that the parties at the outset agreed that the transactions in question should take the forms of loans but not their reality. The defendant bank never parted with the possession of the money claimed to have been loaned by it. It did not subject it to check or any other use whatsoever by the Guthrie Bank. It held it for cancellation of the notes representing the so called loans. At best the Guthrie Bank got title to the funds in that account subject to a condition, which, in our opinion, it never intended to perform and which in fact it never did perform, and for the

non-payment of which the defendant bank asserted its former unconditional title to the money.

The appropriation by the defendant of the money in question for the purpose of cancelling the notes representing the so called loans was in pursuance of an agreement between the two banks to that effect and did not amount to conversion. Bell *v.* Hanover Nat. Bank, 57 Fed. 821; Scott *v.* Armstrong, 146 U. S., 510; Bush-
80 nell *v.* Chautauqua County Nat. Bank, 74 N. Y. 290; Coats *v.* Donnell, 94 N. Y. 168; Judy *v.* Farmers & Traders Bank, 81 Mo., 404.

The fact that the Guthrie Bank entered in its own books the proceeds of the so-called loans as general credits against the defendant bank, ignoring the contract involved in the correspondence resulting in the special accounts, did not operate to give it that general credit or confer upon it the right to draw against it.

The whole transaction was a subterfuge. It afforded the Guthrie Bank the specious opportunity of making a partial and misleading entry in its own books to the effect that it had a greater general credit in the defendant bank than it really had; thereby enabling it to take care of the excessive loans without exciting suspicion.

The correspondence shows that the defendant bank became subserviant to the scheme of the Guthrie Bank, but on terms of absolute security to itself. It accommodated its customer, pretended to make a loan of money, but in reality retained possession and absolute title to the same, and by charging the face of Billingsley's notes to the special account, in the circumstances disclosed, it cannot be said to have made use of any of the money of the Guthrie Bank.

The Guthrie Bank, while a going concern, could not have maintained an action against the defendant for conversion of the money, and neither can the receiver, who takes only the rights of the bank, now do so.

But if the transaction in question evinced a real loan by defendant bank, instead of the pretended one as already found, we must reach the same result.

Many cases have arisen in which the discounting bank has sought to recover from another bank on notes signed personally by one of its executive officers on the ground that, notwithstanding the personal signature, the loan was really made for and in the interest of the bank itself. One of the tests of liability in such cases conceded by counsel in argument to be applicable to this case, is whether the loan was made for the benefit of the bank or of the individual officer; and this has often been determined by ascertaining which party in fact received the benefit of the loan or whether the bank subsequently ratified the loan as its own. Aldrich *v.* Chemical National Bank (*supra*); Hanover National Bank *v.* First National Bank, 48 C. C. A. 482, 109 Fed. 421; Armstrong *v.* Chemical Nat. Bank, 27 C. C. A. 601, 83 Fed. 556; American Preserver's Trust *v.* Taylor Mfg. Co., 46 Fed. 152; Melledge *v.* Boston Iron Co., 5 Cush. 158; Carroll *v.* St. John's etc., Society, 125 Mass. 565.

Applying this test we find that the notes signed by Billingsley

were undoubtedly intended to be made use of by him for the benefit of the bank and not for himself. This is shown by considering the face of the notes, together with the correspondence between the parties attending their negotiation. All these things taken together constitute the contract as between the original parties.

The letters of September 4th and 8th, and November 23rd, written by Billingsley to Strean, defendant's cashier, seem to us conclusive.

81 While Billingsley uses the personal pronoun "I" very often, it is evident he uses it in his representative capacity as president of the bank. For instance, in the first mentioned letter he says: "I have the amount" ($30,000.00) "of excessjve loans that the Department is kicking about, and I will be unable to reduce them to limit for 3 or 4 months. But do not want to make a discount and pay interest when it is not necessary." The fact is, he personally had no excessive loans and there was no personal obligation upon him to reduce them and he personally had no occasion to borrow money for that purpose. The purpose entertained and declared was in some manner to get the use of money for the purposes of the bank only.

Again, in the letter of September 8th, he says, over his signature as president and not as an individual: "I hand you herewith my note for 30Th at 60 days 5% from date and have given the Capitol Nat'l Bank" (that is his own bank) "check on you for like amount and it is agreed that said Capitol Nat'l Bank is to keep this 30Th with you until note is retired together with as large a balance as possible."

In the letter of November 23rd, Billingsley, in transmitting his note for $25,000.00 says: "Please place the proceeds of this note to the credit of the Capitol National Bank of Guthrie Okla." to be used only for the purpose of charging off the note.

These quotations and other features of the letters very clearly show the purpose to have the money which incidentally became available by means of the loan, the current general account and the misleading bookkeeping of the Guthrie Bank, devoted at once to the uses of the bank, and not to Billingsley's own use.

The promise found in the letter of September 8th, to keep as large a general balance on hand as possible and the contemporaneous draft of $30,000.00 against the general account in favor of the Guthrie Bank show how the scheme was to work. The Guthrie Bank was to get out of the general account $30,000.00 for its manipulation in disposing of the excessive loans and by reason of the fact that the special account, even though it could not be drawn against, was to appear in the Guthrie Bank books as a part of its general balance in the defendant bank, the apparent general balance would not be lessened thereby and the bank's reserve would apparently remain intact. It is true the $30,000.00 so drawn in favor of the Guthrie Bank was by it placed to the individual credit of Billingsley, but this was done pursuant to a general custom which had for sometime prevailed there, of keeping and paying out all borrowed money in his individual name. In the light of that custom the last mentioned fact becomes insignificant.

But counsel for plaintiff earnestly contend that Billingsley got the notes representing the three excessive loans and thereby appears to have been the only party benefitted by the deal with the defendant bank.

The special finding of facts discloses that contemporaneously with the honoring of the check for $30,000.00 drawn against the general account in defendant bank, the excessive loans were "taken up or charged out of the assets of the bank," that those notes are not
82 now among the assets of the Guthrie Bank, that "it does not appear what has become of them," that the bills receivable account of that bank was on September 9, credited with $30,000.00, and that the discount register indicated that the three notes were paid on that day.

These facts, and others in connection with them, fail to convince us that Billingsley took title to or possession of those notes, or that the learned trial judge was incorrect in finding that it does not appear what become of the notes, physically speaking. The facts as found, however, determine that the legal title to the notes still rests in the Guthrie Bank. The money drawn against its general account in defendant's bank was made use of by bookkeeping entries to make it appear that the notes had been paid, when in fact they had not been paid. They should properly have been charged to profit and loss, but the Guthrie Bank probably did not have available cash sufficient to do so. Accordingly, the subterfuge was resorted to to secure an apparent general balance with defendant bank larger by $30,000.00 than it really was.

It is too clear for further argument that the notes in question were, with the full understanding of both parties, employed by them as instrumentalities of the Guthrie Bank to do its business and not that of Billingsley personally.

Counsel for defendant contend that subsequent events, notably, the mutual and regular exchange of reconcilement statements, and the treatment of the special account by the defendant without any dissent by the Guthrie Bank, amount to an adoption or ratification by the latter of Billingsley's acts. (See Armstrong *v.* Chemical Nat. Bank.) But we think the facts so clearly show that the original transaction was intended by both banks and subsequently worked out by them for the benefit of the Guthrie Bank, and not of Billingsley, we deem it unnecessary to resort to the doctrine of ratification or estoppel to fortify our conclusion.

In the view we have taken of the foregoing controlling questions, it is unnecessary to answer categorically the several assignments of error. On the finding of facts made by the learned trial judge the judgment as rendered was undoubtedly for the right party and is accordingly *Affirmed*.

Filed April 4, 1906.

83 *(Judgment.)*

And on the fourth day of April, A. D. 1906, in the record of the proceedings of said Circuit Court of Appeals is a judgment in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1905.

WEDNESDAY, *April* 4, 1906.

No. 2296.

CHARLES T. CHERRY, Receiver, Substituted for J. A. Willoughby, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, Plaintiff in Error,

vs.

THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI.

In Error to the Circuit Court of the United States for the Western District of Missouri.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of Missouri, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that The City National Bank of Kansas City, Missouri, have and recover against Charles T. Cherry, Receiver, substituted for J. A. Willoughby, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, the sum of twenty dollars for its costs herein and have execution therefor.

April 4, 1906.

84 *(Comptroller's Direction to Receiver to Prosecute Writ of Error.)*

And on the twenty-second day of May, A. D. 1906, the Comptroller's Direction to the Receiver to Prosecute a Writ of Error was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1905.

No. 2296.

CHARLES T. CHERRY, Receiver, Substituted for J. A. Willoughby, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, Plaintiff in Error,

vs.

THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendant in Error.

Charles T. Cherry, the plaintiff in error in the above entitled cause, is hereby authorized and directed to procure a review of the

decision of the United States Circuit Court of Appeals, for the Eighth Circuit, therein rendered on the 4th day of April, 1906, and for such purpose to prosecute an appeal or writ of error to the Supreme Court of the United States, according as he may be advised by counsel.

WM. B. RIDGELY,
Comptroller of the Currency.

(Endorsed:) Charles T. Cherry, Receiver, Plaintiff in Error, *vs.* City National Bank, Defendant in Error. Comptroller's Direction to Receiver to prosecute Writ of Error. Filed May 22, 1906, John D. Jordan, Clerk. Flynn & Ames, Attorneys-at-Law, Oklahoma City, Okla.

85 *(Petition for Writ of Error.)*

And on the twenty-second day of May, A. D. 1906, a petition for Writ of Error was filed in said cause, in the words and figures following, to-wit:

In the Supreme Court of the United States.

No. —.

CHARLES T. CHERRY, Receiver of the Capitol National Bank of Guthrie, Oklahoma, Plaintiff in Error,
vs.
THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendant in Error.

Petition for Writ of Error.

Charles T. Cherry, Receiver of the Capitol National Bank of Guthrie, Oklahoma, the plaintiff in error in the above-entitled cause, feeling himself aggrieved by the judgment and decision of the Circuit Court of Appeals of the Eighth Circuit entered therein on the 4th day of April, 1906, comes now by his attorneys of record herein, and by direction of the Honorable Comptroller of the Currency, and petitions the court for an order allowing said plaintiff in error to prosecute a writ of error to the Honorable The Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, and for an order that all further proceedings therein be suspended and stayed until the determination of the said writ of error by the Supreme Court of the United States; and in support of this petition files herewith an order from the Honorable Comptroller of the Currency, directing the prosecution of this writ of error; and your petitioner will ever pray.

W. C. SCARRITT,
D. T. FLYNN,
C. B. AMES.

And now, to-wit, on the 16th day of May, 1906, it is ordered that the writ of error be allowed as prayed for.

86 DAVID J. BREWER,
Justice of the Supreme Court of the United States.

(Endorsed:) In the Supreme Court. C. T. Cherry, Receiver, Pltf. in Error, vs. City Nat'l Bank, Deft. in Error. Petition for Writ of Error. Filed May 22, 1906, John D. Jordan, Clerk. Flynn & Ames, Attorneys-at-Law, Oklahoma City, Okla.

(Assignment of Errors.)

And on the twenty-second day of May, A. D. 1906, an assignment of errors was filed in said cause, in the words and figures following, to-wit:

In the Supreme Court of the United States.

No. —.

CHARLES T. CHERRY, Receiver of the Capitol National Bank of Guthrie, Oklahoma, Plaintiff in Error,
vs.
THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendant in Error.

Assignment of Errors.

Comes Charles T. Cherry, Receiver of the Capitol National Bank of Guthrie, Oklahoma, Plaintiff in Error in the above-entitled cause, and files the following assignment of errors committed by the United States Circuit Court of Appeals for the eighth circuit:

First. That the U. S. Circuit Court of Appeals for the eighth circuit erred in rendering judgment against the plaintiff in error in said cause and in favor of the defendant in error.

Second. That the said court erred in affirming the ruling and decision of the Circuit Court of the United States for the Western Division of the Western District of Missouri.

Third. That the said court erred in not reversing the decision and judgment of the Circuit Court of the United States for the

87 Western Division of the Western District of Missouri.

Wherefore The said plaintiff in error prays that the judgment so as aforesaid rendered by the U. S. Circuit Court of Appeals for the eighth Circuit may be reversed because of the errors herein assigned, and that judgment may be entered in this court in favor of the plaintiff in error according to the prayer of his petition, or that the said cause may be remanded to the said court with instructions to grant a new trial of the issues therein involved.

W. C. SCARRITT,
D. T. FLYNN,
C. B. AMES,
Attorneys for Plaintiff in Error.

(Endorsed:) In the Supreme Court. C. T. Cherry, Receiver, Pltf. in Error, *vs.* City Nat'l Bank, Deft. in Error. Assignment of Errors. Filed May 22, 1906, John D. Jordan, Clerk. Flynn & Ames, Attorneys-at-Law, Oklahoma City, Okla.

(Order Allowing Writ of Error.)

And on the twenty-second day of May, A. D. 1906, an order allowing a writ of error was filed in said cause, in the words and figures following, to-wit:

In the Supreme Court of the United States.

No. —.

CHARLES T. CHERRY, Receiver of the Capitol National Bank of Guthrie, Oklahoma, Plaintiff in Error,

vs.

THE CITY NATIONAL BANK OF KANSAS CITY, MISSOURI, Defendant in Error.

Order.

This cause coming on to be heard on the 16th day of May, 1906, upon the application of Charles T. Cherry, Receiver, the plaintiff in error herein, and he having filed an assignment of errors
88 herein and a petition for a writ of error herein, together with an order from the Honorable Comptroller of the Currency of the United States, directing him to prosecute a writ of error to the Supreme Court of the United States, it is hereby ordered, upon the motion of C. B. Ames, Esquire, attorney for the plaintiff in error, that a writ of error be and it is hereby allowed, to have reviewed in the Supreme Court of the United States the judgment heretofore entered by the Circuit Court of Appeals for the eighth Circuit, on the 4th day of April, 1906; and it appearing that the Honorable Comptroller of the Currency has directed that a writ of error herein be prosecuted;

It is ordered that all further proceedings herein be suspended and stayed without bond until the determination of the said writ of error by the Supreme Court of the United States.

DAVID J. BREWER,
Justice of Said Court.

(Endorsed:) In the Supreme Court. C. T. Cherry, Receiver, Pltf. in Error, *v.* City Nat'l Bank, Deft. in Error. Order allowing writ of error. Filed May 22, 1906, John D. Jordan, Clerk. Flynn & Ames, Attorneys-at-Law, Oklahoma City, Okla.

(Writ of Error.)

And on the twenty-second day of May, A. D. 1906, a writ of error was filed in said cause, the original of which with the Clerk's return endorsed thereon, is hereto attached and herewith returned:

89 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Eighth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between Charles T. Cherry, Receiver of The Capitol National Bank of Guthrie, Oklahoma Territory, plaintiff in error, and The City National Bank of Kansas City, Missouri, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 16th day of May, in the year of our Lord one thousand nine hundred and six.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] No. 2296. Charles T. Cherry, Receiver of The Capitol National Bank of Guthrie, Oklahoma Territory, Plff. in Error, *vs.* The City National Bank of Kansas City, Missouri. Writ of Error. Filed May 22 1906. John D. Jordan, Clerk.

90 *Return to Writ.*

UNITED STATES OF AMERICA, *Eighth Circuit, ss:*

In obedience to the command of the w[illegible]a writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the record and proceedings in the within entitled cause, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this fourth day of June, A. D. 1906.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

91 *(Citation.)*

And on the twenty-fifth day of May, A. D. 1906, a citation was filed in said cause, the original of which with the acknowledgment of service endorsed thereon is hereto attached and herewith returned.

92 UNITED STATES OF AMERICA, *ss:*

To The City National Bank of Kansas City, Missouri, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Eighth Circuit wherein Charles T. Cherry, Receiver of The Capitol National Bank of Guthrie, Oklahoma Territory, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable David J. Brewer, Associate Justice of the Supreme Court of the United States, this 16th day of May, in the year of our Lord one thousand nine hundred and six.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

93 [Endorsed:] No. 2296. Charles T. Cherry, Receiver of The Capitol National Bank of Guthrie, Oklahoma Territory, Pl'ff in Error, *vs.* The City National Bank of Kansas City, Missouri. Citation. Filed May 25, 1906. John D. Jordan, Clerk.

Received copy of the within citation and due service of the within citation upon defendant in error is acknowledged this May 22" 1906.

EATON & LOOMIS,
Counsel for Defendant in Error.

94 (*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing Ninety-four pages contain full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said Circuit Court of Appeals, in a certain cause in said Court wherein Charles T. Cherry, Receiver, substituted for J. A. Willoughby, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, was Plaintiff in Error, and The City National Bank of Kansas City, Missouri, was Defendant in Error, No. 2296, December Term, 1905, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the original writ of error, with the Clerk's Return endorsed thereon, and the original citation, with the acknowledgment of service endorsed thereon, are hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at office in the City of St. Louis, Missouri, in the Eighth Circuit, this fourth day of June, A. D. 1906.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 20,284. U. S. circuit court appeals, 8th circuit. Term No. 319. Charles T. Cherry, receiver of The Capitol National Bank of Guthrie, Oklahoma Territory, plaintiff in error, *vs.* The City National Bank of Kansas City, Missouri. Filed June 11th, 1906. File No. 20,284.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

CHARLES T. CHERRY, Receiver of the Capital National Bank of Guthrie, Oklahoma,

Plaintiff in Error,

vs.

CITY NATIONAL BANK, of Kansas City, Missouri,

Defendant in Error.

STATEMENT AND BRIEF OF PLAINTIFF IN ERROR

This case is pending on writ of error to the Circuit Court of Appeals for the Eighth Circuit, to review a decision affirming the the judgment of the Circuit Court for the Western Division of the Western District of Missouri.

The plaintiff in error, (the plaintiff below), brought this suit against the defendant to recover a deposit in the sum of $30,000, which it is alleged the defendant had wrongfully applied to the payment of personal debts of one Charles E. Billingsley.

During the times herein involved Billingsley wes the President and principal executive officer of the Capitol National Bank of Guthrie, Oklahoma, (hereinafter called the Guthrie Bank), and J.

C. Strean was Cashier and S. W. Jurden was President of the City National Bank of Kansas City (hereinafter called the Kansas City Bank.)

On September 9th, 1903, Billingsley borrowed $30,000 from the Kansas City Bank on his personal note and entered into an agreement on behalf of the Guthrie Bank with the Kansas City Bank by which he pledged the deposit of the Guthrie Bank with the Kansas City Bank as collateral security for the payment of his note. On November 9th, when Billingsley's note matured, pursuant to his agreement, the Kansas City Bank charged it against the deposit of the Guthrie Bank, but the Guthrie Bank made no corresponding entry. After a few days Billingsley renewed $25,000 of the amount and appropriated $5,000 of the funds of the Guthrie Bank with which to pay the difference between the old and the renewal note. This new note was a demand obligation and Billingsley made a similar agreement with the Kansas City Bank by which he pledged the funds of the Guthrie Bank to secure the payment of this note. This note remained outstanding until April 4, 1904, on which date the Kansas City Bank charged the note against the deposit of the Guthrie Bank and on the same day the Guthrie Bank closed its doors and was taken over by the National Bank Examiner, M. R. Sturtevant.

Billingsley's note having been charged against the Guthrie bank on the day of its failure and mailed to it, was received by Sturtevant as receiver, who refused to acknowledge it as a proper charge against the funds of the Guthrie bank, and thereafter his successors in office, under the direction of the Comptroller of the Currency, sued the Kansas City bank in this cause for the recovery of its deposit.

The trial court returned findings of fact which are contained in the record and which very fully and fairly state the facts of the case and, on the facts as found, the trial court concluded that the original and renewal loans were bank transactions and consequently rendered judgment for the defendant. This decision was affirmed by the Circuit Court of Appeals.

ASSIGNMENT OF ERRORS.

The errors assigned are:

1st. That the United States Circuit Court of Appeals for the eighth circuit erred in rendering judgment against plaintiff in error in said cause and in favor of defendant in error.

2nd. That the court erred in affirming the ruling and decision of said Circuit Court of the United States for the Western Division of the Western District of Missouri.

3rd. That said court erred in not reversing the decision and judgment of the Circuit Court for the Western Division of the Western District of Missouri.

The trial court having made findings of fact, (which are entirely satisfactory to the plaintiff in error) and having simply concluded, as a matter of law, that on these findings of fact plaintiff in error was not entitled to recover, the error assigned is simply that this conclusion of law is incorrect, and that the Circuit Court of Appeals erred in affirming it.

BRIEF OF THE ARGUMENT.

It is our position that the facts as found by the trial court show that the notes executed by Billingsley were not for the benefit of the Guthrie Bank, that they evidenced his individual obligations and not those of his bank, and in the argument we set out the findings of fact which we think establish this position. The Guthrie bank owned three notes of $10,000 each, in at least two of which Billingsley was personally interested. (Printed record 15-51.) The Bank Examiner directed these loans to be reduced, (15). Billingsley on his personal note borrowed from the Kansas City bank $30,000, which was placed to his personal credit, and against which he checked in payment of the loans criticized by the bank examiner. (15, 16, 17, 18, 19, 51.)

In borrowing this $30,000 from the Kansas City bank Billingsley undertook to pledge the deposit of the Guthrie bank as collateral security for his loan.

Our whole argument rests upon the contention that the notes executed by Billingsley to the Kansas City bank were for his own benefit; and that as he was openly acting both as an individual and as president of the Guthrie Bank, the Kansas City Bank could not rely upon his apparent authority as an agent, but was charged with the knowledge of the exact facts.

Chrystie vs. Foster, 9, C. C. A., 606, 61 Fed. 551.

Lamson vs. Beard, 36 C. C. A., 56, 94 Fed. 30, 45, L. R. A. 822.

Park Hotel Co., vs. Fourth National Bank 30, C. C. A., 409, 86 Fed. 742.

Anderson vs. Kissam 35 Fed. 699.

Gale vs. Chase National Bank, C. C. A. 104, Fed. 214.

State National Bank vs. Newton National Bank, (C. C. A.) 66 Fed. 692.

The transaction was not, in fact, ratified and was not, in law, susceptible of ratification because a National bank cannot hypothecate its funds as collateral security for the debt of another.

National Park Bank vs. G. A. M. W. & S. Co., 116 N. Y. 281.

Etna Nat'l Bank vs. Charter Oak L. Ins. Co., 50 Conn. 167.

Park Hotel vs. Fourth Nat'l Bank, (C. C. A.) 86 Fed. 742.

Germania Safety Vault & Trust Co., vs. Boynton, 71 Fed. 797.

ARGUMENT.

The real controversy is whether or not the loans evidenced by Billingsley's notes were his individual obligations or bank transactions.

If they were bank transactions, made for the benefit of the bank, and if the bank received and appropriated the proceeds thereof, it is our opinion that the judgment of the lower court should be affirmed.

If, on the contrary, they were not for the benefit of the bank and if the bank did not get the proceeds, the judgment should be reversed.

This being true, we wish to invite the court's attention to those findings of fact which settle this point, and it is well here to say that all the negotiations are matters of written record and that, consequently, the ultimate facts cannot be in dispute and opinions can only differ as to the conclusion to be drawn from those facts. (P. 28, 27th finding.)

On September 1, 1903, the Guthrie bank owned three notes for $10,000 each, made respectively by the Missouri, Kansas & Oklahoma Company, the Wild West Show Company, and the Western Horse Show Company. Billingsley was vice-president of the Missouri, Kansas & Oklahoma Company, and treasurer of the Wild West Show Company, and in this capacity executed the notes to the Guthrie bank. (15-51). The figures here and at other pages refer to pages of the record as printed in this court.

On that date, the bank having been examined, the examiner objected to these loans as excessive and directed that they should be *reduced* (15). On September 4, 1903, Billingsley wrote to Strean the following letter (15):

Capitol National Bank, Guthrie, Okla.,
September 4, 1903.

Friend Strean: My stenographer is not on deck, so you will have to try and read my scrawl.

I want you to take my note of $30,000.00 and credit my bank with like amount in a special account with the understanding that said account is not to be checked against.

My reason for wanting this is that I have that amount of excessive loans that the Department is kicking about, and I will be unable to *reduce them to limit* for 3 or 4 months. But do not want to make a discount and pay interest when it is not necessary. Will you do this for me? I have handled this before in this way with our old K. C. account, so I suppose it will be all O. K. with you as you will not be out any money and loan and deposit will offset each other on your books.

With kind regards and thanking you in anticipation, I am as ever,

Your Friend,
CHAS. E. BILLINGSLEY.

On September 5th, Strean wrote to Billingsley in answer to the preceding letter, as follows, (15):

City National Bank, Kansas City, Mo., Sept. 5, 1903

Chas. E. Billingsley, Esq., Guthrie, O. T.

Dear Mr. Billingsley: Yours of the 4th received and noted, and I presented your letter of the 4th to our board and they are willing to make you $30,000.00 loan, but say they cannot do it at a less rate than 5 per cent, as we pay 2 per cent on the balance, and considering the amount we have to keep in reserve against this, they think that is as good as you should ask, and I know we could not do better if we were to ask the same of any of our correspondents, if they should do as well.

The worst I dislike about it is it will increase our loans and if anything woul have a tendency to decrease our deposits.

I trust that this will be satisfactory to you, as we wish to satisfy you, and assure you it is our desire to do so in every way possible and whenever we can.

With kind personal regards, and best wishes I am.

Very, truly yours,

J. G. STREAN, Cashier."

On September 8th, Billingsley wrote to Strean the following letter (16):

Capitol National Bank, Guthrie, Okla., Sept. 8, 1903

Friend Strean: I am in receipt of yours of the 5th for which accept my thanks. I hand you herewith my note for 30 Th at 60 days 5 per cent from date and have given the Capitol Nat'l Bank check on you for like amount and it is agreed that said Capitol Nat'l bank is to keep this 30 Th with you until note is retired together with as large a balance as possible.

Again thanking you and with kind personal regards, I am.

Your friend,

CHAS. E. BILLINGSLEY, President."

The note referred to in this letter is shown in the record at page 16 and was a note for $30,000.00, signed "Chas. E. Billingsley," payable to the Kansas City Bank 60 days after date.

On September 9th, 1903, Billingsley drew his personal check upon the Kansas City Bank and delivered it to the Guthrie bank, which credited it to Billingsleys account and remitted it to Kansas City for credit to its account (17). The Kansas City bank upon receipt of the Billingsley note, placed $30,000.00 to his personal credit (19), and Billingsleys personal check on the Kansas City bank was charged to his personal account and the Guthrie bank was given credit therefor (19). After Billingsleys check on the Kansas City bank had been credited to his personal account on the books of the Guthrie bank, he then drew his check on the Guthrie bank for $30,000.00 with which to pay the three notes for $10,000.00 each heretofore referred to (17, 51). That this may not be doubted we quote the following from the 8th finding, as amended, on page 51:

> "Upon the receipt of the check of Charles E. Billingsley dated September 8th, 1903, above set forth, a credit ticket was made by the Guthrie bank in words and figures as follows:

58 Credit B | R

No. 8762.....10,000
No. 9991.....10,000
No. 8763.....10,000

Sept. 8, 1903.....30,000

And entries in the column headed "when paid" were made September 9th, 1903, on the discount register of that bank opposite the record of the items of discount there recorded, as follows:

August 8, 1903.

	Date of item	Time	Date Disct.	Face	Int.	When Paid
8762 Mo. Kans. & Okla. Co. C. E. B. V. P.	6-8-03	60	6-8-03	10000		9-9-03
8763 Wild West Show Co. C. E. B. Treas.	6-8-03	60	6-8-03	10000		9-9-03

October 29, 1903.

9991 Western Horse Co	7-29-03	..	7-29-03	10000		9-9-03

These promisory notes, Nos. 8762, 8763 and 9991 are the ones hereinbefore referred to as having been objected to by the Bank Examiner on his examination made on th first day of Sptember, 1903. They were taken out of the assets and from the possession of the Guthrie bank and are not now in said assets, and it does not appear what has become of them."

Having done this on September 9th, Billingsley, as president, wrote the National Bank Examiner the following letter (18):

Capitol National Bank, Guthrie, Okla., Sept. 9, 1903.

Mr. Sturtevant, National Bank Examiner, Oklahoma City, Okla.

My Dear Sir: Agreeable to my promise I beg to advise that I have this day had paid to the bank the M. K. & O. R. R. Co., the Wild West Horse Show, and the Western Horse Show Company notes.

Trusting this will meet with your approval, I beg to remain,

Yours very truly,

(Signed) CHAS. E. BILLINGSLEY, President.

At the time the Kansas City Bank received Billingsley's note from him and his check from the Guthrie bank, Strean was apparently absent and Billingsley's check was credited to the general account of the Guthrie bank, but on September 14th, Strean having returned, charged this amount out of the general account of the Guthrie bank and created a special, or No. 2 account, and advised Billingsley personally of the creation of this account, (19-20).

These are the writings and all of the writings creating the contract. Subsequent event might be of importance on the subject of estoppel or ratification if those doctrines be made applicable to a case of this kind, but they cannot alter or affect the contract as here set out. Its alleged validity must stand or fall upon these letters and book entries, and the record thus far must determine the original inquiry, namely: Was this transaction a bank transaction, or was it a Billingsley transaction?

Did the bank receive and appropriate the proceeds of this loan or did Billingsley appropriate them?

If it was a bank transaction and the bank received and appropriated the proceeds thereof, then the plaintiff in error must fail.

If on the contrary, it was a Billingsley transaction and the bank did not receive and appropriate the proceeds thereof, then the contract is ultra vires, absolutely void, and no subsequent acts can give it validity.

As originally made, it is either a valid contract for the benefit of the bank, or it is an ultra vires and void agreement which cannot be ratified and to which future events will not apply the doctrine of estoppel.

WE ASSERT THAT THE REAL TRANSACTION EVIDENCED BY THESE WRITINGS WAS A BILLINGSLEY TRANSACTION, FOR THE FOLLOWING REASONS:

1. THE INDEBTEDNESS WAS EVIDENCED BY BILLINGSLEY'S PERSONAL NOTE.

2. BECAUSE THE PROCEEDS OF THE NOTE, WHEN DISCOUNTED BY THE KANSAS CITY BANK, WERE PLACED TO THE INDIVIDUAL CREDIT OF BILLINGSLEY.

3. BECAUSE THESE PROCEEDS WERE CHECKED OUT OF THE KANSAS CITY BANK BY BILLINGSLEY'S PERSONAL CHECK.

4. BECAUSE THESE PROCEEDS WERE USED TO PAY THREE NOTES TO THE CAPITOL NATIONAL BANK, IN AT LEAST TWO OF WHICH BILLINGSLEY WAS PERSONALLY INTERESTED, HE HAVING MADE THEM AS VICE PRESIDENT AND TREASURER OF THE RESPECTIVE CORPORATIONS.

It seems to us that these four propositions on this record are fundamental and indisputable.

The first three are so plainly obvious that there cannot possibly be dispute or even difference of opinion, and while it seems

to us that the 4th is equally obvious, yet the lower courts apparently did not think so.

The confusion results from confounding the receipt of the money with the appropriation of the benefits of the loan. The Guthrie bank got the money; that must be conceded. But the Guthrie bank did not receive the benefits of the loan. What is the difference? Simply this: The Guthrie bank paid value received when it got the money by paying for this money three notes of $10,000.00 each, the only complaint against which was that they were excessive loans. The confusion results from the different capacities in which Billingsley was acting; sometimes as an individual and sometimes as an officer of the bank.

The fourth proposition above asserted becomes perfectly apparent if we avoid this confusion by assuming that Billingsley and the Guthrie bank were in no way related except that Billingsley was an officer of the Missouri, Kansas & Oklahoma Company and the Wild West Show Company.

Let us assume this state of facts. The Bank Examiner examines the Guthrie bank, with which Billingsley is in no way connected, and he finds objectionable paper which he orders reduced. The Guthrie bank calls upon Billingsley as an officer of these corporations, and says he must pay these notes. Billingsley accordingly borrows $30,000.00 from the Kansas City bank and gives the Guthrie bank his check upon the Kansas City bank with which these notes are paid. The notes are thereupon by the Guthrie bank cancelled and surrendered to Billingsley. It is apparent that the Guthrie bank has received the money arising from the Billingsley loan, but it is equally apparent that the bank has not appropriated the benefits of that loan, but Billingsley has received the benefits of it in that he has used it for the purpose of paying his obligations.

In other words, A owes B $1000.00. B demands payment. A borrows from C $1000.00 with which to pay B and does so. B has received C's $1000.00, but cannot be said to have received

the benefits of A's loan, notwithstanding the fact that he has received the money.

There is a vast difference, therefore, between receiving the proceeds of a loan and appropriating the benefits of it. The fact that the Guthrie bank received the proceeds of this loan does not make it liable on Billingsley's note any more than the fact that B received the $1000.00 made him liable to pay A's note on which the $1000.00 was realized.

Chrystie vs. Foster, infra.
Lamson vs. Beard, infra.
State Nat. Bank vs. Newton Nat. Bank, infra.

In the first letter to Strean Billingsley refers to excessive loans which he wishes to reduce. This reference is untrue. He does not wish to reduce excessive loans. He does not use the money borrowed to reduce excessive loans but he uses it to pay obligations evidenced by notes, two of which he had executed as an officer of other corporations.

What are excessive loans? Loans in excess of ten per cent of the capital and surplus of a national bank.

The capital of the Guthrie bank was $100,000.00. Therefore, the loans referred to were not excessive. Billingsley deceived the Kansas City bank in so stating. But, assuming that they were excessive, how can a bank borrow money to reduce excessive loans? A loan, excessive or otherwise, is an asset. Money borrowed creates a liability. Can a liability be substituted for an asset? Can the bank be said to receive the benefit of a liability created in its name when the proceeds of that liability are used to reduce its assets, so that the net result of the proceeding is to increase its obligations $30,000.00 and decrease its assets by a like amount, leaving it $60,000.00 to the bad? This is certainly a novel way of creating a benefit for the bank.

The real facts are that Billingsley borrowed $30,000.00 on his own note and pledged the funds of his bank as security for its payment.

But the transaction is void for two reasons:

1st. BILLINGSLEY COULD NOT ACT FOR HIMSELF AND FOR HIS BANK BOTH IN A MATTER IN WHICH THEY WERE ADVERSELY INTERESTED.

2nd. THE BANK ITSELF, THROUGH ITS BOARD OF DIRECTORS, COULD NOT HAVE LAWFULLY ENTERED INTO SUCH A CONTRACT.

1.

The Kansas City bank, by accepting Billingsley's individual note and his individual check and a letter from him as President, pledging the funds of the bank for the payment of this individual note, placed itself in the attitude of dealing with Billingsley acting as an individual and as President of his bank. It therefore was charged with notice of the real facts and of his authority in the premises, and it occupies the same position now as though it had known then that Billingsley was deceiving them and robbing his bank. That a person dealing with an officer of a bank who acts in this dual capacity is charged with knowledge of the exact facts is thoroughly established by the authorities, as well as by reason:

Chrystie vs. Foster (C. C. A.), 61 Fed. 551, Wallace, C. J.:

This was a suit by the Receiver of the Cheyenne National Bank to recover the sum of $10,000.00 and interest as the balance of the account due that bank from the defendants, who were New York bankers. Collins was president of the Cheyenne bank. He made his note for $10,000.00 in favor of the defendants, who discounted it and placed the proceeds to the credit of the Cheyenne bank. When the note was discounted, Collins the president of the Cheyenne bank, told the defendants that his bank would not draw against the credit. In the course of the opinion it is said:

'About June 1, 1890, Collins nformed the defendants that, pursuant to his understanding with Stebbins (one of the defendant

partners), they had been charged on the books of the (Cheyenne) bank with a deposit of $10,000.00 and that this balance had appeared against hem on the books of the bank for several months. At the same time he requested the defendants to notify the Cheyenne bank that the $10,000.00 had been deposited with them to its credit, and told them that the bank would not draw against the credit. After some correspondence between Collins and the defendants and on June 7th, 1890, the defendants credited the bank on their books with $10,000.00 and sent them a notice as follows: 'Your account is credited ths day $10,000 for use J. W. Collins with you.' A day or two after they requested Collins to forward to them a new note for $10,000 in place of that held by them, and which had been placed in their hands by Stebbins. Collins sent them a new note, but it was not satisfactory to defendants in matters of form, and upon July 23d they again requested him to send them his note, payable on demand, and to send them at the same time, but separately, an authorization, signed by him as president of the bank authorizing them to charge up the note against the bank. Shortly thereafter Collins sent the new note to the defendants, together with the authorization, signed by him as president of the bank, to the effect that whenever a note for $10,000 made by Collins to the order of himself, indorsed by him in blank, should be presented to them for payment, they were to pay the same and charge the amount to the account of the bank. Thereafter, and until November 13, 1891, the bank remained credited in this account upon the books of the defendants, and the defendants remained charged upon the books of the bank with the $10,000, and statements were transmitted between the bank and the defendants, from time to time, showing the state of the accounts. November 13th the defendants learned that Collins was financially embarrassed, and thereupon they charged the account of the bank with the amount of the note. November 15 the bank failed, and passed into the hands of the plaintiff as Receiver. Between June 7, 1890, and November 15, 1891, Collins' individual account at the bank was largely

overdrawn, and he owed the bank, at the time of the failure, about $9,000.

"Upon these facts we entertain no doubt that plaintiff was entitled to a verdict. If Collins had deposited $10,000 with the defendants in the name of the Cheyenne National Bank, to be held by them for the bank in the form of an ordinary banker's credit to a depositor, it being understood between him and them that it was the purpose of the transaction to give him credit with the bank as for so much money received by it from him, it is entirely plain that no one without the authority of the bank would have had any right to meddle with the fund. By a deposit in its name, or to its credit, the title to the fund would have vested in the bank, and the defendants would have been at all times under obligation to pay it over to the bank at its request. * * * The authorization to defendants by Collins, in his official capacity as president of the bank, to apply the funds in their hands belonging to the bank in payment of his note, does not protect the defendants. He who assumes to rely upon the authority of an agent to bind his principal to the discharge of the agent's own obligation must prove actual authority if contest arises. No principle of law of agency is better settled than that no person can act as the agent of another in making a contract for himself. West St. Louis Sav. Bank vs. Shawnee Co. Bank, 95 U. S. 557; National Park Bank vs. German American Nutual Warehouse & Security Co., 116 N. Y. 281; 22 N. E. 567; Anderson vs. Kissam, 35 Fed. 699."

Lamson vs. Beard (C. C. A.), 94 Fed. 30, Woods, C. J.

Suit by Beard as Receiver of the First National Bank of Pella, Iowa, to recover from defendants, who were commission merchants in Chicago, the proceeds of drafts of the Pella bank drawn in defendants' favor and delivered to them by Cassatt, president of the bank, in discharge of his individual liabilities to them. The defendants were held liable. The court says:

"The inquiry therefore which these plaintiffs in error should have made was whether Cassatt had authority to draw drafts of

the bank upon funds of the bank in possession of its correspondents for use in his individual transactions. * * * The one thing necessary to be known was whether Cassatt had authority to make the proposed use of the bank's paper. The authority could have come only from the directors, by direct resolution, or by acquiescence, or implied consent, and the plain, unmistakable course was to push the inquiry, wherever begun, to the source of authority."

The bank books were falsely kept so as to show that Cassatt had money in the bank to his credit. Against this account the drafts were charged. The court says:

"The entries on the books, it may be said, tended to show the facts as stated; but the entire finding shows that Cassatt was not a depositor; and in no way made good to the bank the moneys taken from it by means of the drafts, which takings, it is expressly found, were acts of theft or embezzlement. * * * False entries took no moneys out of, and put none into, the bank, and it was not for the fraudulent bookkeeping, or forgeries, or any other wrong or series of wrongs which preceded the execution of the drafts, that the plaintiffs in error were held responsible. On the contrary, we agree that, if they are to be compelled to make restitution, it is because the particular sums which they received were wrongfully taken by Cassatt from the bank and they were parties to the wrong. * * *

"While the transactions appeared upon the books, as stated in the findings, it is a misuse of words and inconsistent with honest thought, to say that they were known to the bank. Possession of facts, in books purposely kept in a manner to conceal the truth, is not, in law or morals, knowledge of the facts. Cassatt alone had knowledge of the truth, and though he was president, his knowledge of his own frauds, perpetrated for his individual purposes, was not attributable to the bank. * * * These considerations of bookkeeping, course of dealing, negligence of directors, and estoppel aside, the main question is simplified: When Cassatt tendered these drafts—each one of them to the

payee named in it in payment of an individual obligation, in which the bank was not interested—was the taker, accepting the paper in discharge of the debt, a purchaser in good faith, or was he put upon notice of Cassatt's lack of authority to draw upon the funds of his bank for his individual purposes? Upon that question, our conclusion is that the opinion in Anderson vs. Kissam, 35 Fed 699, is sound in principle and in accord with the weight of authority. * * * 'It is an acknowledged principle of the law of agency,' it was there said, 'that a general power or authority given to the agent to do an act in behalf of the principle does not extend to a case where it appears that the agent himself is the person interested on the other side. If such a power is intended to be given, it must be expressed in language so plain that no other interpretation can rationally be given it; for it is against the general law of reason that an agent should be intrusted with power to act for his principal and for himself at the same time.' See also Hanover National Bank vs. American Dock & Trust Co., 148 N. Y., 612, 43 N. E. 72. * * * We agree with counsel for the defendant in error that the concern of the courts should not be to make it easy for persons in fiduciary positions to make way with that which is committed to their care, by relaxing this salutary rule, through considerations of the supposed necessities of business and commerce, and that the rule should not be suspended where the opportunities for breach of trust are largest, merely because they are large. The best public policy requires that bank officials be rigidly held to the ordinary and well understood rule. There is, we believe, no good reason to the contrary."

In Anderson vs. Kissam, 35 Fed. 699, it is said:

"But no usage, however common and well recognized, can be invoked to justify a banker, or any one else, in taking money or negotiable paper in payment of an agent's debt, known to belong to his principal, or known to belong to a trust estate, to satisfy the trustee's personal debt, or to shield the banker from accountability, who willfully closes his eyes and stops his ears

to facts and circumstances which import notice that the agent or trustee is misappropriating the money or property entrusted to him. Therefore, if there is any significance in the fact that a bank president or cashier offers negotiable paper of his corporation, made by him in his official character, in payment of his personal debt, or to raise money for his personal use, it matters not that bankers generally do not appreciate it. If they regard the transaction as equivalent to one in which the individual comes with money in hand, they ignore its real character, because in that case he comes with what purports to be his own, having possession which implies title and ownership, and the right to use it as he sees fit. When he comes with money obligation of a corporation, which is the contract of a corporation only because he has made it, and which is not its contract if he has made it without its authority, the transaction is a very different one. Every person who takes such an obligation must ascertain at his peril that the agent who made it was authorized to do so; and the moment that it appears that the contract has been made for the agent's own use and benefit, that moment his authority is impunged and impeached. No principle of law of agency is better settled than that no person can act as the agent for another in making a contract for himself. Therefore it is that a bank president or cashier has no implied authority to bind his corporation to negotiable paper made for his own use; and if it appears upon the face of the paper that it is payable to the individual who has made it in an official capacity, the obligation is nugatory, and no purchaser can enforce it. * * * As is stated in Wharton on Agency (Sec. 139): 'The pretension by an agent to extraordinarp or peculiar powers is by itself sufficient to arouse suspicion.' When the transaction is such as should arouse suspicion of the agent's authority to represent his principal, it is the duty of those who deal with him in a representative character to apply to his principal for information."

In Gale vs. Chase Nat. Bank, (C. C. A.) 104 Fed., 214, the syllabus reads:

"The cashier of a bank, as such, has no authority to issue cashier's drafts to his own order in payment of his individual debts, and a creditor accepting a draft so drawn takes the risk of such lack of authority. To warrant a finding that the cashier of a bank has implied authority to issue cashier's drafts to his own order in payment of his additional debts, such as will bind the bank and protect a creditor in accepting a draft so drawn for a sum so large as to be out of the usual line of conduct in the banking business, a settled course of business must be shown, by which he was permitted, with the acquiescence of the directors, to exercise such authority during a series of years or in numerous transactions; and evidence that he had drawn not exceeding nine drafts in all in payment of his own debts, only four of which were to his own order, and all of which were issued within the preceding six months, is insufficient."

This case was again before the Circuit Court of Appeals: Gale vs. Chase Natl. Bank, 108 Fed. 987. It also came before the Supreme Court of the United States and is there reported as Rankin v. Chase Natl. Bank, 188 U. S. 557. In the opinion of that court rendered by Mr. Justice White, the doctrine above stated is fully recognized.

In State Natl. Bank vs. Newton Natl. Bank, (C. C. A.) 66 Fed. 691, Thayer, C. J., said:

"It is hardly necessary to observe that the making of an agreement of that nature (the cashier had agreed that a note should be charged by his bank's correspondent to his bank's account) is wholly outside of the ordinary functions of a cashier, and that persons dealing with such officers have no right to presume that they have been vested with authority to make agreements of that character. Upon the state of facts disclosed by the answer and admitted by the motion, the case presented for decision was not one in which a bank cashier had assumed to borrow money for the use and benefit of his bank, but it was one in which he had attempted to pledge the credit of the bank to secure a discount of his own notes for the benefit of a third party. It is

clear, we think, that McLain, as cashier, had no implied power to bind the defendant by a transactoin of that kind; for, even if the board of directors of the bank could make such use of the bank's credit—a proposition which we need not discuss—it would not be within the scope of the ordinary duties of a cashier to thus pledge its credit and funds. West St. Louis Sav. Bank vs. Shawnee Co. Bank, 95 U. S. 557; Bank vs. Armstrong, 152 U. S. 346, 14 Sup. Ct., 572."

In Park Hotel Co. vs. Fourth Nat. Bank, (C. C. A.) 86 Fed. 742, opinion by Sanborn, C. J., it is said:

"There is an objection to the recovery i nthis case, however, which lies deeper and is liable to be more fatal in its consequences than any answer we might give to that question. It is that the execution of this note was not within the scope of the general power of the president to make commercial paper of the corporation. General authority to conduct the business and to issue the promissory notes of the corporation is authority to do these acts for corporate purposes, and in the interest of the corporation only. It does not include the power to do them for the exclusive benefit of others to the detriment of the corporation. And while a promissory note, made by an agent or officer having such authority, in the usual form, and taken by a stranger in the ordinary course of business, carries with it the presumption that it was issued for corporate purposes, and under lawful authority, a note issued by such an agent, payable to himself, is accompanied by such presumption, but is itself notice that it is without the scope of his general power and that it does not bind his principal, unless its execution was specially authorized by the corporation, through its directors or officers, other than the agent to whom it is payable. Such a note is a danger signal, which the discounter or purchaser disregards at his peril. It is notice to him that, if it is contested, he cannot recover upon it, under any general authority of the agent, or at all, unless he proves that the agent was specially authorized to make that particular transaction, or to make contracts of the corporation with him-

self. To the general rule that the acts and contracts of a general agent, within the scope of his powers, are presumed to be lawfully done and made, there is an exception as universal and inflexible as the rule. It is that an act done or a contract made with himself by an agent on behalf of his principal is presumed to be and is notice of the fact that it is without the scope of his general powers, and no one who has notice of its character may safely rely or recover upon it without proof that the agent was expressly and specially authorized by his principal to do the act or to make the contract. West St. Louis Sav. Bank. vs. Shawnee Co. Bank, 95 U. S. 557; Bank vs. Wagner, (Ky.) 20 S. W. 535, 537; Smith vs. Association, 78 Cal., 289, 293, 20 Pac. 677; Mor. Priv. Corp., Sec. 517; State Natl. Bank vs. Newton Natl. Bank, 32 U. S. App. 52, 58, 14 C. C. A. 61, 64, and 66 Fed. 691, 694; Bank vs. Armstrong, 152 U. S. 346, 353, 14 Sup. Ct. 572; Chrystie vs. Foster, 26 U. S. App. 67, 72, 9 C. C. A. 606, 609, and 61 Fed. 551, 553; Bank vs. Atkinson, 55 Fed. 465, 472, 474; Claflin vs. Bank, 25 N. Y. 293, 295, 299, 301; Gallery vs. Bank, 41 Mich. 169, 2 N. W. 193; Chamberlain vs. Wool-Growing Co., 54 Cal. 102. This exception is a striking illustration of the policy of the law to prevent the possibility of conflict between the duty and the personal interest of an officer or agent. It prohibits him from acting for both himself and his principal wherever their interests clash, and makes every act and contract in which he violates the inhibition voidable at the election of his principal. It forbids him to act at the same time as vendor and purchaser, or as lender and borrower, or as promisor and promisee. It forbids him to sell as the agent of his principal, and to buy for himself; to promise as the agent of his principal, and to acept the promise and reap the benefits himself. McKinley vs. Williams, 36 U. S. App., 749, 752, 20 C. C. A., 312, 313, and 74 Fed. 94, 95, and cases cited; Donovan v. Campion, 27 C. C. A., 177, 85 Fed. 71, 73."

2.

The bank itself, through its board of directors, could not lawfully enter into such a contract, because becoming surety for an-

other is ultra vires a National oank.

Corporations are not only incapable of making contracts which are forbidden by their charter, but in general they can make none which are not necessarily essential either directly or indirectly to effect the object of their creation. Angell and Ames on Cor., 139; Bell vs. Cunningham, 3 Pet. 69.

No power to become surety for another or to pledge funds for acommodation is conferred by law on national banks and no such power can be implied. These powers are conferred in Sec. 3136 Revised Statutes. Sedg. on St. Const., 2 Fed. 291; Central Park vs. E. D. L. Co., 26 Barb., 23.

In National Park Bank vs. G. A. M. W. & S. Co., 116 N. Y. 281, in the opinion of Follett, C. J., it is observed that the charter of the defendant corporation does not contain "a provision empowering defendant to bind itself by making or endorsing promissory notes for the accommodation of makers for a consideration paid. It is well settled that such a power is not incidental to the powers expressly conferred on corporations organized under statutes authorizing the formation of corporations for banking, insuring, manufacturing and like corporations. (Citing authorities) * * * The fact that the maker of the promissory notes procures it to be discounted for his own benefit is, if unexplained, notice to the discounter that the endorsement is not in the usual course of business, but is for the accommodation of the maker. Stahl vs. Catskill Bank, 18 Wend. 466; Fielden vs. Lahens, 9 Bosw. 436; Hendrie vs. Berkowitz, 37 Cal. 113; Leonine vs. Bank of N. A., 3 Dill 44; Broom vs. Helm, 53 Miss. 21; Daniel on Negotiable Instruments, 2 Ed. 297, 365; Edwards on Bills, 3 Ed. 98, 105."

In Bridgeport City Bank vs. Empire S. D. Co., 30 Barb. 421, it is said: 'Whether a corporation can become surety, either as accommodation endorser, or in any other form, we supposed was beyond all question finally established."

In Bank of Geneva vs. Patchin Bank, 3 Kernan (N. Y.) 309, it is said:

"It is quite clear that the officers of a banking association or other corporations, have no power to engage the institution as surety for another. Such a transaction is without the scope of the business of the company."

Aetna National Bank vs. Charter Oak L. Ins. Co., 50 Conn., 167. The syllabus in this case, which is supported by the decision, is as follows:

"W., who was president of a life insurance company, chartered with no unusual powers, indorsed in its name a note of a railroad company of which he was also president, and procured the note discounted at the plaintiff bank, the proceeds being put to the credit of the railroad company. The note was a renewal, the proceeds of the original having been applied to the payment of an overdraft of the railroad company at the bank. W. had, with the assent of the directors of the insurance company, been the manager of its finances, and had signed and endorsed its paper to a large amount as its president; but it did not appear that he had made any use of the company's name, with the knowledge of the directors, which they considered as binding on the company, except when it was understood that it received the proceeds or the direct benefit of the transaction. Held: 1. That the insurance company had no poew rto endorse an accommodation note for a third party. 2. That if it had such power, yet W., as its president, had no individual authority from the facts stated to sign its name for such a purpose."

In Davis vs. Old Colony R. R. Co., 131 Mass 258, there is an elaborate discussion of the doctrine of ultra vires as applied to corporations by Chief Justice Gray. The syllabus is as follows:

It is beyond the power of a railroad corporation chartered by the legislature or of a corporation organized under the statutes of 1870 c224, for the manufacture and sale of musical instruments, to guarantee the payment of expenses of a musical festival; and no action can be maintained upon such a guarantee, although it was made with a reasonable belief that the holding of the proposed festival would be of great pecuniary benefit to the corpora-

tion by increasing its proper business, and the festival has been held and expenses incurred in reliance upon such guaranty."

In Culver vs. Reno R. E. Co., 91 Penn. 367, it was held:

"That when no consideration passed to a corporation it was not liable as principal and its officers had no authority to bind it as surety; and when the creditor knew he was loaning money to an officer of the company for his individual use and that the company received no consideration therefor, the equities between the creditor and shareholders of the company must be determined against the creditor."

In Park Hotel Company vs. Fourth National Bank, 86 Fed., 7742, it is said by Sanborn, C. J.: "But it is ultra vires of a corporation to make accommodation paper, or to guarantee the payment of the obligation of others. Lyon Potter & Co. vs. First National Bank of Sioux City, 85 Fed. 120, 122; National Park Bank vs. German-American Mut. W. & S. Co., 116 N. Y., 281, 292; 22 N. E., 567; Central Bank vs. Empire Stone-Dressing Co., 26 Barb. 23; Bridgeport City Bank vs. Same, 30 Barb., 421; Farmers & Mechanics Bank vs. Same, 5 Bosw. 275; Morford vs. Bank, 26 Barb. 568; Genesee Bank vs. Patchin Bank, 13 N. Y. 309; Aetna Nat. Bank vs. Charter Oak Life Ins. Co., 50 Conn. 167; Monument Nat. Bank vs. Globe Works, 101 Mass. 57; Davis vs. Railroad Co., 131 Mass. 258; Culver vs. Real Estate Co., 91 Pa. St. 367; Hall vs. Turnpike Co., 27 Cal. 255; Madison W. & M. Plank Road Co. vs. Watertown & P. Plank Road Co., 7 Wis. 59; Lucas vs. Transfer Co., 70 Iowa, 541, 549, 30 N. W., 771. Here, too, is the answer to the contention that the hotel company is estopped from contesting the validity of these notes. A contract which a corporation has no power to make, it has no power to ratify, and no power to estop itself from denying. Bank vs. Kennedy, 167 U. S. 362, 371, 17 Sup. Ct. 831; Union Pac. Ry. Co. vs. Chicago, R. I. & P. Co., 163 U. S. 564, 581, 16 Sup. Ct. 1173; Central Transp. Co. vs. Pullman Palace Car Co., 139 U. S., 24, 59, 60, 11 Sup. Ct. 478; Railway Co. vs. Hooper, 160 U. S., 514, 525, 530, 16 Sup. Ct. 379."

In Germania Safety Vault & T. Co. vs. Boynton, 71 Fed. 797, in the opinion of Lurton, C. J., is is said:

"The corporation had no power to lend its credit to Herman & Pank. Its obligations entered into for that purpose would be void in the hands of one who took them with notice. The consent of the stockholders would not strengthen the case. * * * No authority to lend credit to another is to be implied from the mere fact that it might be beneficial to the corporation to support the credit of another or that thereby business might be induced or increased."

In National Bank of Commerce vs. Atkinson, 55 Fed. 465, Riner, J., said:

"There is no doubt but what the law is that a national bank cannot loan its credit or become an accommodation endorser. On that question the decisions are uniform. It is also true that the president of a bank has no power inherent in his office to bind the bank by the execution of a note in its name, yet the power to do so may be conferred upon him by the board of directors, either expressly, by resolution to that effect, by subsequent ratification, or by acquiescence in transactions of a similar nature, and of which the directors have knowledge. In other words, I think it must be held that banks are liable for the acts of their agents, especially executive officers and general agents, within the general scope and apparent sphere of their duties; but that they are not liable for the acts of their officers done without special authority, in cases which are not within the general scope and sphere of their duties as such officers. The responsibility of a bank (in the absence of express authority to do a particular act) is limited to the acts of its officers and agents, performed in the discharge of their ordinary duties in the usual course of business and within the sphere and scope of such duties."

An approach to the point involved in this case from an entirely different angle will aid in a complete view. If we assume that Billingsley had paid these notes to the Kansas City Bank, either by compulsion or voluntarily, and that this suit was

brought by him against the Guthrie bank to recover on the notes, we have a statement of the case which really simplifies the point involved.

Billingsley would have the same right to maintain such an action that the Kansas City bank has to maintain its defense and the mere suggestion of the issue as between Billingsley and the Guthrie bank is sufficient to convince the mind that Billingsley could not recover. The Kansas City bank cannot claim a greater right than Billingsley would have, because it dealt with Billingsley knowing him to be acting both for himself and as agent for his bank and therefore was bound by the actual and not by the apparent transaction.

ANALYSIS OF THE OPINION OF THE CIRCUIT COURT OF APPEALS.

The opinion of the Circuit Court of Appeals discloses that the case turned upon the question we have been discussing, that court being of the opinion that the Guthrie bank was the real party in interest and received the benefit of the loan.

At this point we wish to direct the attention of the court to the fact that that opinion is not a finding of fact by that court, but a conclusion based on the findings of fact. The opinion, therefore, does not carry with it that weight which is attached to a finding of fact in the lower court, but is purely a conclusion of that court as to the meaning of the ultimate facts.

This court is, therefore, perfectly free to inquire into the facts here without the embarrassment of a finding by the lower court.

The court (65) seems to be of the opinion that Billingsley "had taken special charge of negotiating and making loans for his bank."

By referring to page 55, a statement of loans made by the Guthrie bank will be seen, from which it appears that all other loans were evidenced by the notes of the bank signed in its name by Billingsley, President, and Nelson, Cashier, and that in no

other case were the proceeds of any loan placed by the lending bank to the personal credit of Billingsley, but such proceeds were uniformly credited direct to the Guthrie bank.

Referring to the proceeds of the $30,000.00 note, the lower court (66) say:

"Its proceeds were placed to the credit of the Guthrie Bank in a second or special account as contemplated by the correspondence, not subject to check."

This is a serious error. The undisputed facts are that the proceeds of the note were placed to Billingsley's personal credit and that they only reached the account of the Guthrie bank through Billingsley's personal check against this personal credit. It is, therefore, a serious mistake to say that the proceeds of the note were placed to the credit of the Guthrie bank. These funds did not reach the account of the Guthrie bank until the records disclosed to the Kansas City bank that Billingsley was dealing personally with this fund, and it is this particular transaction which places the Kansas City bank upon its guard and commands it at its peril to stop immediately and inquire into Billingsley's actual authority. It must not be forgotten, therefore, that the proceeds of this note were not placed to the credit of the Guthrie bank, but that the proceeds of Billingsley's check were placed to the credit of the Guthrie bank.

The difference between the two facts is fundamental and the form which this transaction took differentiates it clearly from any loan ever negotiated for the Guthrie bank.

The lower court pursues this same erroneous theory when it says (67):

"The check of Billingsley for $30,000.00 referred to in his letter of September 8 was duly honored and the amount ultimately charged to the general account of the Guthrie bank and its proceeds, when received or made available at Guthrie, were employed in taking up or charging out the three excessive loans complained of by the examiner."

Billingsley's check was not charged to the Guthrie bank; it

was charged to Billingsley's personal account. Its proceeds were not employed in charging off the excessive loans but in paying them, as the records of the bank clearly show.

Again, the court say (68):

"The defendant bank never parted with the possession of the money claimed to have been loaned by it. It did not subject it to check or any other use whatsoever by the Guthrie bank."

The fact is that the proceeds of the loan were placed to Billingsley's personal credit, that he checked those proceeds out and that the Kansas City bank honored his check. If this did not subject the funds to check, then the findings of fact have no meaning.

If the facts found do not show that this money was used in paying the three notes heretofore referred to then we are unable to comprehend their force. If this money was checked against by Billingsley and used to pay three notes, then clearly the Guthrie bank parted with value and the fund was used.

The following quotation from the opinion shows conclusively that the lower court based its decision upon the theory that the loan was for the benefit of the Guthrie bank:

"Many cases have arisen in which the discounting bank has sought to recover from another bank on notes signed personally by one of its executive officers on the ground that, notwithstanding the personal signature, the loan was really made for and in the interest of the bank itself. One of the tests of liability in such cases conceded by counsel in argument to be applicable to this case, is whether the loan was made for the benefit of the bank or of the individual officer; and this has often been determined by ascertaining which party in fact received the benefit of the loan or whether the bank subsequently ratified the loan as its own." (69)

And again:

"It is too clear for further argument that the notes in question were, with the full understanding of both parties, employed

by them as instrumentalities of the Guthrie bank to do its business and not that of Billingsley personally." (71)

Of course, if this is true, as we have originally stated, the lower court was right, but if, as we have tried to show, this theory was untenable, then the lower court was wrong and the issue is sharp and clear and we again inquire, how could the Guthrie bank borrow money with which to pay its own bills receivable? What benefit did the Guthrie bank get from this loan?

It seems to us apparent that the real transaction was just as stated in the correspondence; that Billingsley borrowed $30,000.00 from the Kansas City bank and pledged the funds of the Guthrie bank as collateral security and that the Kansas City bank knew that Billingsley was giving his individual note, knew that he was giving his individual check, knew that he was acting in the capacity of an individual and as an officer at the same time, and therefore was charged with knowledge that he could not pledge the funds of his bank for his individual benefit.

There is not a syllable in the record showing that Billingsley meant this note to be the obligation of his bank, nor is there a syllable in the record showing that the Kansas City bank understood that this note was an obligation of the Guthrie bank. It is apparent, however, that both Billingsley and the Kansas City bank intended that his individual note was to be secured by the pledge of the funds to the credit of the Guthrie bank, and that therefore Billingsley, as president of the Guthrie bank, was undertaking to hypothecate the funds of that bank to secure his individual note, which contract is void, and the Kansas City bank is just as guilty of the fraud and deception as was Billingsley. As said in the lower court: "The defendant bank became subservient to the scheme of the Guthrie bank, but on terms of absolute security to itself. It accommodated its customer, pretended to make a loan of money, but in reality retained possession and absolute title to the same, and by charging the face of Billingsley's note to the special account, in the circumstances disclosed, it can-

not be said to have made use of any of the money of the Guthrie bank." (69).

What limit, may we ask, does the law place upon fraud, if this is correct? Is the transaction under discussion a legitimate transaction? Does it appeal to the court's sense of honesty and fair dealing? Or does it smack of fraud, of violation of the law, of studied effort to deceive the United States? If it does, why should the highest court of the land stamp its approval upon such business methods? Is it not better that the guilty party should suffer, rather than the innocent creditors of the Guthrie bank? Is it not better that bankers throughout the Union should be required to deal honestly, legitimately and fairly rather than they should be invited to a course of dishonesty, illegality and unfairness?

That Billingsley and the Kansas City bank both understood that this was Billingsley's personal obligation secured by pledge of the funds of the Guthrie bank is apparent from the letters shown at page 25 of the record, which are as follows:

20th. On December 12th, 1903, S. W. Jurden, President of Defendant, wrote and sent by mail to Chas. E. Billingsley, the following letter:

"City National Bank,

"Kansas City, Mo., Dec. 12, 1903.

"Charles E. Billingsley, Esq., Guthrie, O. T.

"Dear Mr. Billingsley: In looking over your letter of November 24th, in reference to the $25,000, special deposit, I notice you failed to sign the letter officially, but signed the note Pt. I think you made a mistake in not signing the letter officially and leaving the note stand with your individual name on it. I know it was your intention Mr. Billingsley to have the note signed individually and the letter oficially, so I enclose the letter for you to add pt. to your signature, and you can instruct us to erase the word Pt. from the note. I know this is exactly what you wanted and thought I had better call your attention to it while it was

fresh in my mind. Kindly add Pt. to the enclosed letter and return it to us. Very truly yours,

"S. W. JURDEN, President."

Enclosed and sent therewith was the letter hereinbefore set forth, which letter was in words and figures as follows:

"Capitol National Bank,

"Guthrie, Okla., November 23, 1903.

"James G. Strean, Esq., Cashier, City National Bank, Kansas City, Mo.

"Dear Sir: Herewith find enclosed my demand note for $25,000, bearing interest at the rate of 5 per cent per annum from date. Please place the proceeds of this note as a special deposit to the credit of the Capitol National Bank of Guthrie, Okla. It being expressly understood and agreed that this fund is not subject to check, but is to remain with the City National Bank for the payment of this note, and you are hereby authorized to charge this note to said account at any time you desire.

"Very truly yours,

"CHAS. E. BILLINGSLEY."

21st. On December 15th, 1903, Chas. E. Billingsley wrote and sent by mail the following letter:

"Capitol National Bank,

"Guthrie, Okla., Dec. 15, 1903.

"S. W. Jurden, Pres., City National Bank, Kansas City, Mo.

"Dear Sir: I am in receipt of your favor of the 12th, all of which I note and will say that I believe the cigars are on me. I hand you herewith my letter of Nov. 23, signed "president," and I would thank you to kindly cancel the signature of President on my note of $25,000, making it read Chas. E. Billingsley, instead of President.

"Thanking you for calling my attention to this matter and regretting the trouble I have put you to and assuring you I will furnish the cigars the first time I am in Kansas City, beg to remain, Yours truly,

"CHAS. E. BILLINGSLEY, President."

The one legal proposition in the opinion of the court with which we take issue is that the appropriation by the Kansas City bank of the money in question for the purpose of paying the note does not amount to a conversion of the fund. The court cite the following cases as sustaining that legal proposition (69): Bell vs. Hanover National Bank, 57 Fed. 821; Scott vs. Armstrong, 146 U. S. 510; Bushnell vs. Chautauqua County National Bank, 74 New York 290; Coats vs. Donnell, 94 New York 168; Judy vs. The Farmers and Traders Bank, 81 Mo. 404.

It is our opinion that no one of these cases is in point, and that none of them supports the doctrine to which they are cited.

In Bell vs. Hanover National Bank, the Bank of Red Cloud, of which Bell was receiver, had borrowed money from the Hanover National Bank, and had at the time of its failure a deposit with the Hanover National Bank. Under these facts the Hanover bank, as a matter of law, hd the right to retain the deposit and credit it on the indebtedness, but the Red Cloud band had expressly agreed that the Hanover bank should have a lien on its deposit to secure the note, and there was no denial of the fact that the Red Cloud bank owed the indebtedness and that it had negotiated and received the benefit of the loan.

If in the case at bar the note in controversy was executed in the name of the Guthrie bank and if the Guthrie bank had received the benefit of it, then the case of Bell vs.Hanover National Bank would be in point; but that case is based upon a statement of facts which is exactly the opposite of the facts in the case at bar, and consequently is not in point unless the court decides that the Billingsley note was the note of the Guthrie bank and that the Guthrie bank received the benefit of it, and if the court reaches this conclusion then we concede that our contention is wrong.

In Scott vs. Armstrong certain questions were certified to the supreme court from the circuit court of appeals for the sixth circuit, and they hold that where one national bank has a deposit with another at the time of its insolvency and at the

same time is indebteded to that other bank, that the lending bank can offset the deposit against the loan. By applying that doctrine to the case at bar it simply means that if the Billingsley note had been the note of the Guthrie bank that after the bank went into the hands of the receiver the Kansas City bank could, without any contract, have charged the note against the deposit of the Guthrie bank.

In Bushnell vs. Chautauqua Co. Nat. Bank the court simply held that where upon a contract for the sale of oil by the plaintiff to S., the defendant bank made an endorsement that S. had deposited with it $2500, "to be held by us as collateral security for the faithful performance of the within contract," and where the bank had the $2500, it could be required to apply it under the contract. The court say:

"So long as the bank undertakes nothing more than to pay over the money deposited with it to the person who may according to the conditions upon which the deposit was made become entitled to receive it, we think it does not transend its powers."

Coats vs. Donnell was a case in which one private banker accepted a draft made against it by another private banker, upon the conditon that the drawer would keep on deposit with the drawee until the maturity of the draft a balance sufficient to pay the draft and that the drawee should have a lien on such balance as security for its acceptance. The drawer failed and the drawee charged the acceptance against its deposit. And this transaction was sustained; it being held that the officers of the drawer bank had the authority to make the contract, it having received the benfit thereof.

In Judy vs. The Farmers and Traders Bank, the syllabus discloses its entire irrelevancy. "A bank which receives a deposit under an agreement to apply it to the payment of a debt due a designated person cannot divert it from the purposes of the trust by paying it to a different one."

It, therefore, appears to us that the authorities cited by the court do not sustain the position that the Kansas City bank

was not guilty of a conversion of the funds of the Guthrie bank when it applied them to the payment of Billingsley's personal indebtedness, under a contract made by him without authority and which was ultra vires of the Guthrie bank itself.

We invite especial attention to the following cases, as they seem to squarely sustain our theory:

Chrystie vs. Foster, 9 C. C. A., 696, 61 Fed 55.

Lamson vs. Beard, 36 C. C. A., 56, 94 Fed 30, 45 L. R. A., 822.

Park Hotel Co. vs. Fourth Nat. Bk., 30 C. C. A. 409, 86 Fed 742.

THE RECORD IN THIS CASE DOES NOT SHOW RATIFICATION.

The Circuit Court of Appeals did not rest the decision upon the doctrine of ratification, and we, therefore, do not feel disposed to discuss this propositon at length, but suggest that the contract, as we understand it, was ultra vires, and therefore impossible of ratification, as is held by the authorities which have been heretofore quoted.

There is nothing in the record to show that this transaction ever became known to any director of the bank. In fact, the special account was carefully concealed on the books of the Guthrie bank and never appeared except on the reconcilement book. Its general account shows its transactions with the Kansas City bank entirely free from any entries which would suggest it, and when the $30,000 note was charged to the Guthrie bank no corresponding entry was made on the books of the Guthrie bank, but the transaction was ignored on the Guthrie bank's books until after the renewal note of $25,000 had been given, and then the only entry was to credit the Kansas City bank with $5,000 and charge a like amount to Billingsley's personal account, so that there was nothing in those entries which would in any way show the real state of facts. (22-23-24.)

The fact that bank officers have possesion of books purposely kept in a manner to conceal the truth, does not charge them with knowledge of the facts.

Lamson vs. Beard, 94 Fed. 30, 36, C. C. A. 56, 45 L. R. A., 822.

This point, however, not having been considered material by the lower court and being so clearly untenable, we do not feel any necessity for discussing it further.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

—IN THE—

Supreme Court of the United States.

CHARLES T. CHERRY, Receiver of THE CAPITOL NATIONAL BANK, of Guthrie, Oklahoma Territory, *Plaintiff in Error*,

vs.

CITY NATIONAL BANK, of Kansas City, Missouri, *Defendant in Error*.

STATEMENT AND BRIEF OF DEFENDANT IN ERROR.

I.

J. A. Willoughby, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, brought an action at law in the United States Circuit Court for the Western Division of the Western District of Missouri against the City National Bank of Kansas City, Missouri. Charles T. Cherry succeeded J. A. Willoughby as receiver of the Capitol National Bank. At the time of the transactions in question, Chas. E. Billingsley was the president, and G. A. Nelson was the cashier of the Capitol National Bank, hereinafter called the "Guthrie Bank." At the same time, S. W. Jurden was the president, and J. G. Strean was the cashier, of the City National Bank of Kansas City, Missouri, hereinafter called the "Kansas City Bank."

II.

THE FACTS.

Upon the trial of the cause in the Circuit Court, special findings of fact were made by the court, (Printed Record pp. 14-38, Numbered 1-34), upon which a judgment was rendered in favor of the Kansas City Bank.

About September 1st, 1903, the Guthrie Bank had been examined and the examiner had complained as to certain loans which had been made by the bank, and particularly of three notes for $10,000 each, made respectively by the Missouri, Kansas and Oklahoma Company, dated June 8th, 1903, and discounted on that day by the Guthrie Bank; one note made by the Wild West Show Company, dated June 8th, 1903, due sixty days after date, and discounted by the Guthrie Bank on that date; and one note made by the Western Horse Show Company, dated July 29th, 1903, due ninety days after date, discounted on that date. (Findings Nos. 4-8.)

During, and prior to September, 1903, and thereafter, the Guthrie Bank had a large number of transactions with the Kansas City Bank, in which the Guthrie bank kept an active account in which deposits were made from time to time and checks and drafts made thereon; the business between the two banks was practically continuous, in which large sums of money were exchanged in the manner customary in such cases between banks. During the time of all of the transactions and business between the two banks, Chas E. Billingsley as the President, chief officer and manager of the Guthrie Bank, had especial charge of the making of loans; and he in most instances conducted the negotiations and dictated the correspondence. (Finding No. 3).

For the purpose of enabling the Guthrie bank to charge off the excessive loans of which the examiner had

complained, application was made to the Kansas City bank and the transactions were the subject of several letters, the negotiations being all contained in correspondence, of which the following is the first letter:

CAPITOL NATIONAL BANK,
GUTHRIE, OKLAHOMA.

September 4, 1903.

Friend Strean: My stenographer is not on deck, so you will have to try and read my scrawl.

I want you to take my note of 30,000.00 and Cr. my bank with like amount in a special account with the understanding that said account is not to be checked against.

My reason for wanting this is that I have that amount of excessive loans that the department is kicking about, and I will be unable to reduce them to limit for 3 or 4 months. But do not want to make a discount and pay interest when it is not necessary. Will you do this for me? I have handled this before in this way with our old K. C. account, so suppose it will be all O. K., with you as you will not be out any money and loan and deposit will offset each other on your books.

With kind regards and thanking you in anticipation, I am as ever,

Your friend,
CHAS. E. BILLINGSLEY.

To which J. G. Strean, Cashier of the Kansas City, Bank, replied as follows:

CITY NATIONAL BANK,
KANSAS CITY, MO.

September 5, 1903.

Chas. E. Billingsley, Esq., Guthrie, O. T.

Dear Mr. Billinsgley: Yours of the 4th received and noted, and I presented your letter of the 4th to our board and they are willing to make you

$30,000.00 loan, but say they cannot do it at a less rate than 5 per cent as we pay 2 per cent on the balance and considering the amount we have to keep in reserve against this, they think that is as good as you should ask, and I know we could not do any better if we were to ask the same of any of our correspondents, if they should do as well.

The worst I dislike about it is it will increase our loans and if anything would have a tendency to decrease our deposits.

I trust that this will be satisfactory to you, as we wish to satisfy you, and assure you it is our desire to do so in every way possible and whenever we can.

With kind personal regards, and best wishes, I am,

Very truly yours,
J. G. STREAN, Cashier.

To which Chas. E. Billingsley, as President of the Guthrie bank, replied as follows:

CAPITOL NATIONAL BANK,
GUTHRIE, OKLAHOMA.

September 8, 1903.

Friend Strean: I am in receipt of yours of the 5th for which accept my thanks. I hand you herewith my note for 30 Th at 60 days 5 per cent from date and have given the Capitol Natl. Bank check on you for like amount, and it is agreed that said Capitol Natl. Bank is to keep this 30 Th with you until note is retired together with as large a balance as possible.

Again thanking you and with kind personal regards, I am,

Your friend,
CHAS. E. BILLINGSLEY,
President.

With the last letter was transmitted a note for $30,000 due sixy days after date, signed Chas. E. Billingsley. (Findings Nos. 4-6.)

For the purpose of making the proceeds of this loan available in the Guthrie Bank, Chas. E. Billingsley gave to that bank his personal check, which check was transmitted in regular course to the Kansas City Bank. At the same time, upon receiving this check, the personal account of Billingsley in the Guthrie Bank was charged with the amount of $30,000, being his personal check on the Guthrie bank for that amount, and bills receivable account of the Guthrie bank was credited with a like amount, and the three notes of which the bank examiner had complained were charged off and out of the assets of the bank. (Findings Nos. 7-8). And thereupon Billingsley mailed the bank examiner a letter to the effect that the three objectionable notes had been paid.

The transaction was a borrowing of money by and for the use of the Guthrie bank to accomplish the specific purpose indicated in the correspondence. (Finding No. 9). And the transaction in the Guthrie bank was the placing of the proceeds of the loan in Billingsley's personal account and checking it out, as had been done with the proceeds of other notes given by the bank. (Finding No. 28.)

After obtaining the money, and its use as above, the following course of business took place between the two banks; The Guthrie bank had credit in special or No. 2 account in the Kansas City bank for the proceeds of the note of $30,000, and in its own accounts it had and used the deposit shown in special or No. 2 account, but did not undertake to keep any corresponding account. Throughout all of these transactions, the Guthrie bank had no bills payable account. All of its borrowed money, which was considerable, was carried in the account of

Chas. E. Billingsley in the Gutrie bank. (Finding No. 28.) A course of reconciling these accounts, followed by which monthly statements were made by the Kansas City bank to the Guthrie bank, which showed both its general and special accounts, and the Guthrie Bank reconciled accordingly, but did not open up any corresponding special account upon its books. By these reconcilements the Guthrie bank was continually advised of the conditions of the special or No. 2 account in which the special deposit was made and in which the credits of interest accruing at 2 per cent in accordance with the contract, were from time to time entered, (Finding No. 23).

On November 9th, 1903, the Kansas City bank charged the $30,000 note to the special or No. 2 account, together with interest accruing on the note in accordance with its terms, the charge being $30,250. At this time, special or No. 2 account had credit, with the interest that had accrued upon the deposit at the rate of 2 per cent, and the account accordingly showed an overdraft of $177.68. (Findings Nos. 11-12.)

Concerning and following the maturing of this note, the following correspondence took place: (Findings Nos. 13-17).

CAPITOL NATIONAL BANK,
GUTHRIE, OKLAHOMA.

November 7, 1903.

J. G. Strean, Cashier,
City National Bank, Kansas City, Mo.

Friend Strean: My note for $30,000 will be due Monday. I would thank you to kindly extend this thirty or sixty days and charge our account with interest, and advise, and oblige. Trust this will meet with your approval.

Yours truly,
CHAS. E. BILLINGSLEY,
President.

To which J. G. Strean, cashier, replied as follows:

CITY NATIONAL BANK,
KANSAS CITY, MO.

November 9, 1903.

Chas. E. Billingsley, Esq.,
Guthrie, O. T.,

Dear Charley: Your letter of the 7th received and you say that your note for $30,000 will be due Monday; well, old man, we have taken you at your word; we have charged your account with note, and return same herein, for the reason Charlie we can find no collateral. Mr. Jurden is out of town, and we, of course, will be glad to renew it for you on satisfactory collateral, and I enclose blank collateral note herein for that purpose. If the collateral was returned to you, let me know. I was out of town when this loan was made, and you can bet your boots old man we are going to treat you right. With kind personal regards, I remain,

Very truly yours,
J. G. STREAN,
Cashier.

To which Chas. E. Billingsley, as president of the Guthrie bank, replied as follows:

CAPITOL NATIONAL BANK,
GUTHRIE, OKLAHOMA.

November 22, 1903.

J. G. Strean, Cashier City National Bank, Kansas City, Mo.

Dear Sir: I am in receipt of your favor of the 9th enclosing my note for $30,000, all of which I note. I would have replied ere this but expected to see you at the convention, and as you know I had Mr. Nelson call on you to explain this situation fully, hence I will not attempt to go into detail now, and beg to hand you herewith my note for $30,000, which kindly do with as you did on the previous in-

stance. You understand that this fund is to be drawn out at any time. It is to be kept there at all times to protect this note, but we simply want it to stand there for our credit for reasons stated to you by our Mr. Nelson. Trusting this is satisfactory, beg to remain,

Yours truly,

CHAS. E. BILLINGSLEY, President.

In regard to which G. A. Nelson, cashier of the Guthrie Bank, wrote as follows:

CAPITOL NATIONAL BANK,

GUTHRIE, OKLAHOMA.

November 23, 1903.

J. G. Strean, Cashier City National Bank, Kansas City, Mo.

Dear Sir: Upon my return and after the rush of the convention I find your letter of Nov. 3, relative to Merchants National Bank at Houston, Texas, and will say that their assistant cashier, Mr. W. H. Hurley, was in attendance at the convention and I had quite a nice chat with him relative to his business. He is going to furnish us with a par list and we hope to be able to give him some business, as we know they are able to handle it, and also do what we can with you in this.

We are indeed sorry that you were not able to be with us at the convention, as everybody seemed to have a very pleasant time, and the convention was voted the greatest success in Oklahoma meetings.

Mr. Billingsley informed me that he forwarded you the note which I spoke to you about, last Saturday, and by the way, Friend Strean, how did you come out with that account at Dover? If you have not received that let me know and I will take it up again.

With kind personal regards,

Yours truly,

G. A. NELSON, Cashier.

And to the letter of Billingsley, S. W. Jurden, president of the Kansas City Bank, replied as follows:

CITY NATIONAL BANK,
KANSAS CITY, MO.

November 24, 1903.

Chas. E. Billingsley, Esq., Guthrie, O. T.

Dear Sir: Your letter of the 23d received addressed to Mr. Strean. Mr. Strean is out of the city to-day and will probably not return until tomorrow. I have your note for $30,000.00 which you enclosed, requesting us to place proceeds to the credit of your bank as a special deposit. In presenting this matter to our attorney he suggested that we make a demand note instead of 60-day note, which we are perfectly willing to carry. Instead of making it for $30,000.00, we prefer to keep within our limit as the Comptroller has taken us to task several times for making excessive loans. We did not suppose the $5,000 would make any material difference, so we have made note for $25,000.00, which I enclose herein, together with a letter which, when signed and returned to us with the note, the proper credit will be given as per your letter.

Trusting this will be entirely satisfactory, we remain,

Very truly yours,

S. W. JURDEN, Pt.

To which Chas. E. Billingsley replied as follows:

CAPITOL NATIONAL BANK,
GUTHRIE, OKLAHOMA.

November 30, 1903.

S. W. Jurden, Pres. City National Bank, Kansas City, Mo.

Dear Sir: I am in receipt of yours of the 24th, all of which I note. I have executed the $25,000.00 note and signed letter as per your request, and hand

you the same herewith. Trust this is satisfactory, and with kind regards, beg to remain,

Yours truly,

CHAS. E. BILLINGSLEY, President.

And further wrote Strean, the cashier, as follows:

Guthrie, Okla., November 23, 1903.

James G. Strean, Esq., Cashier City National Bank, Kansas City, Mo.

Dear Sir: Herewith find enclosed my demand note for $25,000, bearing interest at the rate of 5% per annum from date. Please place the proceeds of this note as a special deposit to the credit of the Capitol National Bank of Guthrie, Oklahoma. It being expressly understood and agreed that this fund is not subject to check, but is to remain with the City National Bank for the payment of this note, and you are hereby authorized to charge this note to said account at any time you desire.

Very truly yours,

CHAS. E. BILLINGSLEY. (Prest.)

In the last letter was enclosed a demand note for $25,000, the proceeds of which were credited on the books of the Kansas City Bank in special or No. 2 account, and reconcilements followed in respect to such account until early in the year 1904, when the monthly reconcilements were changed to daily reconcilements, and interest at 2% was allowed on the deposit charged in the account and interest was paid on the $25,000 demand note by the Guthrie Bank. (Findings Nos. 22 and 32.) Subsequent to this transaction it was discovered that Billingsley had signed the note as president and had signed the letter of November 23, transmitting the demand note individually. His attention was called to the reversal and by correspondence (shown in findings of fact) the change was made so that the letter was signed President and the

letters "Pt." were stricken from the note. The matter was carried this way until April 4th, 1904, when the Kansas City Bank charged the $25,000 note to special or No. 2 account, returning the same to the Guthrie Bank, which suspended in the afternoon of the same day, of which suspension and the financial embarrassment of the Guthrie Bank the Kansas City Bank had no knowledge when it charged the $25,000 note to the special account and thus closed the transaction on its books.

III.

These and other letters set out in the findings constitute the pivotal facts in the controversy, and they make distinct and definite contracts between the two banks. By the first contract, the Guthrie Bank obtained for its use and benefit $30,000; it placed that amount in its general account current; used that amount for the specific and definite purpose of charging off objectionable bills receivable, and by the second contract it was enabled to continue to hold and use in its general and current account and business the amount of $25,000. As appears by the findings, the manner of handling the business by the two banks was not the same; the Kansas City Bank pursued the exact terms of the contract and kept the deposit in special or No. 2 account, which was not subject to check and against which it charged the notes at maturity. The Guthrie Bank received the proceeds and deposited them in the individual account of Billingsley, in which was kept the borrowed money of the bank, and thereupon used the same for the purposes above stated, and continued to retain the amount throughout the time covered

by the transactions in its general business,—that is to say, the money obtained from the Kansas City Bank was put into general use in the regular and ordinary business transactions of the Guthrie Bank. By this action, it is sought by the receiver of the Guthrie Bank to recover as against the Kansas City Bank the special deposits which arose by reason of the contracts and which were the proceeds of the two notes signed by Billingsley. The plaintiff seeks to avoid the terms of the contract relating to these special deposits upon the theory that the notes themselves constitute and are the only contracts between the parties, and that such notes are and were, the individual obligations of Billingsley. While the notes and the special deposits are inseparably associated and inter-dependent, the plaintiff would dissociate the notes and the special deposits from the transactions and correspondence, and thus sever the contracts which were entire, and seek a recovery of the special deposits, while, at the same time, ignoring that they exist only by reason of being the proceeds of the notes, which notes he would repudiate as not being bank transactions. In other words, the receiver seeks to obtain the fruits of the contracts while repudiating their obligations.

The Guthrie Bank always recognized these contracts, acted upon them, and repeatedly ratified them as follows:

(a) It took the $30,000 and placed it in the personal account of its president, where it kept its borrowed money. (Finding No. 7.)

(b) It forthwith used the proceeds to charge out from its assets notes aggregating $30,000 which had been previously objected to by the Comptroller of the Currency through the bank examiner. (Finding No. 7.)

(c) It forthwith took credit in its general account current with the Kansas City Bank for the amount of the loan. (Finding No. 7.)

(d) It recognized the creating of the special account in the Kansas City Bank, and repeatedly reconciled it upon statements from the Kansas City Bank. It received advice of the creation of such special account, and received interest upon the deposits contained therein, being the proceeds of the $30,000 note and the $25,000 note. (Findings Nos. 11, 22 and 23.)

(e) In the transaction concerning the $25,000 note, it caused to be paid $5,000 on the original $30,000 indebtedness, and made a contract for a special deposit with reference to the balance of $25,000 and carried such balance in its general account current without change and without question as to the transaction being in behalf of the Guthrie Bank. (Findings Nos. 13, 14, 15, 16 and 17.)

(f) To pay the $5,000 difference between the $30,000 obligation and the $25,000 obligation, the cashier of the Guthrie Bank wrote a check on the account of Billingsley, in which was kept the proceeds of loans made by the bank, for the sum of $5,000 to provide for the difference. (Findings Nos. 18 and 30.)

(g) With reference to the loan in question, it transacted the business and made disposition of the proceeds in the personal account of Billingsley and created a special deposit in the Kansas City Bank in the same manner as it had previously done and in accordance with a course of business prevalent and long existing in the Guthrie Bank. (Findings Nos. 28, 30 and 31.)

(h) The Guthrie Bank paid interest upon the $25,000 note in a direct transaction with the Kansas City Bank. (Finding No. 32.)

(i) Every act and step in the business done and taken by the Guthrie Bank was in acquiesence and ratification of the contracts as bank transactions, and there was no act or objection against the contracts or transac-

tions as bank obligations by any of its officers or directors, or anyone in its behalf.

The entire transaction was closed before the suspension of the Guthrie Bank. The contract had been performed, and the $25,000 note paid, canceled and charged to the special account, in accordance with the contract, and *all* done and completed without knowledge on the part of the Kansas City Bank that the Guthrie Bank was in a failing condition. (Finding No. 24.)

IV.

The attorneys for the plaintiff in error have stated in their brief, at pages 8 and 9, that the writings or written communications create the contract; that its validity must stand or fall upon the letters and book entries, and that the record must determine the inquiry as to whether this was a bank or whether it was a Billingsley transaction,—whether the bank received and appropriated the proceeds of this loan, or did Billingsley appropriate them. It is admitted that if the transaction was that of the Guthrie Bank, the plaintiff in error must fail. It is asserted that the transaction was with Billingsley only because he personally signed the notes and the proceeds were placed to his individual credit in the Kansas City Bank, and because those of the first note were checked out by his personal check, and further because the proceeds were used to *"pay"* the three notes to the Guthrie Bank in at least two of which Billingsley was personally interested, because he signed one of them as vice-president and another one as treasurer of the makers. To sustain any of these propositions urged by the plaintiff in error necessitates the elimination of material parts

of the transactions and correspondence, as shown in the findings of fact. In Billingsley's first letter there is a generous use of the personal pronouns,—which often occurs, and is nothing more than a display of business egotism. The letter, however, specifically asks for a credit to the Guthrie Bank in the sum of $30,000, against which it would not check. The reason given was that the bank had excessive loans about which the department was kicking and that the bank would be unable to reduce them to limit for three or four months; that the bank did not want to make a discount and pay interest when it was not necessary. And a precedent was cited in which the bank had handled a similar matter in the same way in a previous transaction. This previous transaction is shown in finding No. 31. This letter, therefore, together with the correspondence following, will not bear the construction that the transaction was with Billingsley individually and for his personal account. The fact is, as found, the loan and the renewal of a part thereof was not made to Billingsley; he was insolvent, and it would be a violation of the entire correspondence to give force and effect to his personal assumptions and his individual signing of the note alone in determining the character of the contract.

On page 26 of plaintiff in error's brief, the opinion of the Circuit Court of Appeals is criticised because it states as a fact that the proceeds of the notes were placed to the credit of the Guthrie Bank in a special or second account, as contemplated by the correspondence, not subject to check. This is challenged as *"a serious error,"* and it is stated that the undisputed facts show that the proceeds were credited to the personal account of Billingsley. Counsel are mistaken in regard to this criticism. Findings Nos. 10 and 11 show the facts to be as stated in the opinion of the Circuit Court of Appeals, from which findings it appears that both the Billingsley

note and his check came to the Kansas City Bank, the letters containing them were opened by the bookkeeper in the absence of Strean, the cashier, and the bookkeeper made the entries without knowing the terms of the contract. Within a few days thereafter the cashier, Mr. Strean, returned to the bank, found the entries thus made by the bookkeeper, and thereupon immediately changed them so as to comply with the contract, and advised Billingsley accordingly. It will thus appear that the criticism of counsel is based not upon the facts, but upon the mistake of the bookkeeper in the absence of the cashier.

It is true that the proceeds of the note were temporarily, but as will appear by mistake, placed in the personal account of Billingsley in the Kansas City Bank. They were, however, immediately charged to the special or No. 2 account in accordance with the contract (Finding No. 11) and were carried in that account throughout the entire transaction, and, as will be seen from the findings, the regular reconcilement statements showed to the Guthrie Bank continually the condition of this special or No. 2 account. It is, therefore, clear that the statement that these proceeds were checked out of Billingsley's personal account is not a reference to the real transaction.

Nor does the course of business pursued with reference to this money and the checks made by Billingsley at Guthrie, one upon the Kansas City Bank, and the other upon his own personal account, each in amount $30,000, show that it was an individual transaction. Finding No. 30 will explain why the transaction took this form. This finding is as follows:

> 30th. When the money was obtained upon a note the proceeds were carried to the personal account of Billingsley in the Guthrie Bank, and as payments were made upon such loans, or as they were paid, checks would be drawn upon that account in

payment. This course of business made it so that there was no Bills Payable account in the Guthrie Bank.

The statement that Billingsley was personally interested in the three $10,000 notes charged off because he was vice-president of one corporation and treasurer of another, we believe, under all of business rules and the law governing the relations of officers to corporations, must be abandoned. Where an officer acts for a corporation by reason of his office, it cannot be said that his acts are of a personal character; and if he acts within the scope of his official position, he cannot be personally liable. It is an incorrect statement of the fact to say that these three notes were *paid* simply because in the discount ledger under the column "When paid," a date had been entered; nor is it correct to say that they were paid off because Billingsley wrote the bank examiner to that effect. It is apparent that Billingsley stated to the bank examiner what was necessary to exonerate his bank from the complaint regarding the three notes. It is likewise an entire misconception of all of the facts, as well as the relations of the bank to these three notes, to assert that the bank in any way parted with its property in these notes. Charging them off or out of the active assets of the bank did not change the ownership. The bank owns the notes now, unless it has parted with them for value, or received payment from the makers; and the intimation that the bank in any way suffered because of the charging off of the three notes is contrary to every fact found in the case and contrary to the course of business governing, and the law relating to such a transaction. The actual fact is that the Guthrie Bank did not change its financial condition by these transactions: The $30,000 of charged-off notes still belonged to it. It had borrowed $30,000 and pledged

it in special account to pay the obligation created by the loan which gave rise to the $30,000. In reality, the Guthrie Bank stood in exactly the same position with reference to its assets after the transaction as it did before. It was enabled to evade the objection raised by the bank examiner, and in no other respect was its financial condition changed. If the Kansas City Bank were adjudged to pay the $30,000, that amount would be clear gain to the Guthrie Bank, because it would then have the $30,000 borrowed, it would not be obligated to pay the Billingsley note, and it would still have the $30,000 of charged-off paper for which the credit was obtained. It is also true that the assumption that the three $10,000 notes were paid is directly contrary to the fact as found by the trial court. The finding of fact in this respect is in the following language (Finding No. 8):

> They were taken out of the assets and from the possession of the Guthrie Bank and are not now in said assets, and it does not appear what has become of them.

In the face of this finding, it is mere assumption to assert that Billingsley got the notes. With all the means at hand for tracing the disposition made of these notes, the plaintiff in the court below left that fact undisclosed. It is not found, nor does it appear that Billingsley took or ever had the notes; nor does it appear that they were not paid after they were charged off, nor does it appear that the makers were insolvent, or that the bank might not have sued the makers and collected the notes, or that it has not done so, or that the receiver might not do so now.

The assumption that Billingsley individually took up the loans charged off gives rise to another anomalous condition: Billingsley was not obligated individually to rid the bank of the objectionable loans; this was an obli-

gation resting alone upon the bank. There would be an entire want of consideration in the assumption by Billingsley of the obligation of the bank in the use of his own money to relieve it from the embarrassment. If force is to be given to such a course, we must assume that the parties acted in a most unusual and extraordinary manner and in direct opposition to their declared purposes, intentions and statements. The disposition made of the notes charged off must necessarily have been a separate transaction. What did the bank do with them? Who got them? Were they paid by the makers? These questions are unanswered in the findings because no fact was shown in the case making an answer possible; neither the contract nor the findings show that Billingsley intended to take up and pay the three notes. The purpose as expressed was to reduce excessive loans by charging them off,—a term which does not mean a transfer of or a parting with the notes by the bank. The transaction does not mean that Billingsley paid them or that they were transferred to him. The surmise on page 10 of plaintiff in error's brief that Billingsley as an officer of two of the makers, paid two of the notes, and for some unknown reason paid the third note, is without any basis or support.

Finding No. 8 is instructive upon what became of these three notes. The receiver of the bank could have certainly shown what became of them. None of the makers are found to have been insolvent. The proceeds went to the St. Louis & San Francisco Railroad Company in the sum of $15,749.75, to the Wild West Show Company in the sum of $4,250.25, and to W. D. Fossett $10,000.00. All were customers of the bank and had open, active accounts which were overdrawn in large amounts, which throws much light on the financial standing of the parties actually liable to repay the money ob-

tained upon the credits covered by these notes. In the face of these facts, what foundation is there for the assumption that Billingsley paid them?

The course of business pursued in the Kansas City Bank, while unusual, and perhaps irregular, amounted to nothing more than a pledge of the proceeds of the notes. The course of business, however, in the Guthrie Bank is extremely unusual. The carrying of borrowed money in the personal account of its president, in which account he made personal deposits and upon which he made personal checks; the carrying of the proceeds of this loan into the general balance of the Guthrie Bank; the act of deceiving the bank examiner by the Billingsley transaction,—which could not have been done if he had entered the special or No. 2 account on the books of the Guthrie Bank,—are all irregular. Outside of the naked transaction, this course of business pursued by the Guthrie Bank does not appear to have been known to the Kansas City Bank. No question had been raised upon the character of the business transacted. Certainly, the receiver of the Guthrie Bank cannot sustain his claim that the transaction was individual, when there is no foundation for such a claim. A finding was made showing the condition of the Billingsley personal account with respect to the proceeds of loans which had been placed therein (Finding No. 28), from which it has been sought to deduce the argument that the loans placed in that account could not be paid therefrom without showing an overdraft. If any conclusion can be drawn from this state of the Billingsley account, it appears to us that it entirely negatives the idea that the $30,000 became Billingsley property by reason of it being entered in this account.

POINTS, BRIEF OF AUTHORITIES AND ARGUMENT.

First--The giving of the second note in renewal of the first and payment of the difference of $5,000 closed the first transaction, and the charging of the renewal note to the special account closed the second transaction. And the contracts with respect to the original loan and its renewal were fully performed and executed in accordance with their terms.

Second--The notes and special deposits were bank transactions. The notes were the obligations of the Guthrie Bank, and the deposits in the Kansas City Bank were used by the Guthrie Bank for the purpose named in the contract.

Third--The Guthrie Bank recognized and ratified the transactions and contracts of its President, Billingsley, with the Kansas City Bank as its acts, and as made for its use and benefit.

Fourth--The transactions and contracts were within the power of the Guthrie Bank and within the authority of its President.

Fifth--There were no adverse interests between Billingsley and the Bank in connection with the contracts or transactions, which were the borrowing of money for the use of the bank, and, therefore, there is no question of want of power in the bank to borrow the money and perform the contracts it made in respect thereto.

I.

From the facts as found by the trial court, it appears that recovery is sought of the amount of the proceeds of the Billingsley notes as deposited in the special account in the Kansas City Bank. The petition does not specify whether a recovery is sought for the proceeds of the last $25,000 note or whether it is sought to recover the proceeds of both notes. In any view of the case, under the contracts, the renewal of $25,000 of the original note superseded the first transaction and made a new contract in respect to the part so renewed. The first contract provided that the amount of $30,000 was to be credited to the Guthrie Bank in a special account not to be checked against; that portion of the transaction was closed by the renewal and charging the first note to the special account. The renewal $25,000 note was payable upon demand and by the express terms of the second contract the proceeds were to be placed in the special deposit to the credit of the Guthrie Bank and were not subject to check, and were to remain in the Kansas City Bank for the payment of the note, and authority was given to charge the note to this special account at any time the Kansas City Bank *might desire*. The Kansas City Bank did charge the $25,000 note to this special account in accordance with the contract; therefore, the contract was entirely performed and executed. Force must be given to these provisions of the contracts. The Guthrie Bank, its receiver, and the Comptroller of the Currency (who is shown in the record to have advised and directed this action), seem to have entirely overlooked the palpable injustice of enforcing payment from the Kansas City Bank after a full performance of the contracts. The action of the receiver of the Guthrie Bank is admitted to be based upon

the contracts, and if they were performed no right of action would lie.

These contracts were not the notes only as supposed by the plaintiff in error. The action of the plaintiff *to recover the special deposits* contradicts the position taken that the notes constitute the only contracts. As will appear from the facts found, the notes were given by Billingsley for money to be used by the Guthrie Bank in replenishing its assets occasioned by the charging off of condemned bills receivable. By the terms of the contracts, the payment of the notes was secured by the special deposits now sought to be recovered. These notes were canceled and surrendered, and the transactions entirely closed, and each of the banks acted in respect thereto in exact compliance with the contracts made by Billingsley. The following proposition is supported by unbroken authority: If the contract was not *ultra vires* in the sense that the corporation was without power to make it, the performance of such a contract will defeat any attempt to set it aside and avoid it. During the performance of the contract it may be voidable; after performance it is final and conclusive.

We are concerned, therefore, in this case only with the proposition as to whether the Guthrie Bank had power through its officers to borrow money of the Kansas City Bank for the purpose of replenishing its assets by reason of its being compelled to charge off notes condemned by the Bank Examiner and Comptroller of the Currency. The cases cited in this brief are direct and decisive upon the proposition that one of the essential functions of a bank is the right, authority and power to borrow money under such circumstances. It is a known fact in the banking world that such transactions are frequent and usual, and the courts have repeatedly recognized that borrowing money is one of the especial functions of banking.

Upon this view of the case, it does not matter that the Guthrie Bank had and used an irregular method for handling the money obtained under the contracts after it had received it. When the claims and assumptions in plaintiff in error's brief are examined, it is found that the entire basis upon which a recovery is sought is centered around the *irregular transactions in the Guthrie Bank in the use of Billingsley's private account for depositing the proceeds of its bills payable.* It dealt with the outside world as if it were conducting a regular business in this respect and the transactions were closed upon their face in the same manner that they would have been closed had the Guthrie Bank kept a regular bills payable account. But it is said that if the borrowed money had been taken out of Billinsgley's account, it would have been overdrawn. What of it, and how does that effect the transaction? How does such fact make the contracts individual and not the bank's? This condition did not prevent the use of the credit for the purpose for which it was obtained. *Simplified, the Guthrie Bank got* $30,000, *and* $25,000, *from the Kansas City Bank and used it for the purpose for which it borrowed it on its books and in its balances and business with the Kansas City Bank, it transferred the very money it borrowed to a special account to pay the notes at maturity,* all of which was done and the transactions closed. *The possibility of controversy was ended.* Why, therefore, should the receiver take the money from the defendant and avoid *the very obligations* which originated and created the cause of action and basis of recovery?

The contracts were not illegal, and no such claim was made. The plaintiff as receiver of the Guthrie Bank has no legal authority to impeach or disaffirm the lawful and authorized acts of the bank, and where its contracts have been executed and performed, a receiver subse-

quently appointed cannot litigate obligations arising under such contracts in any action, legal or equitable. Alderson on Receivers, page 738, Secs. 534 and 535. The contrcts in this case were what are defined to be "executed contracts." *Farrington* v. *Tennessee,* 95 U. S., 683. And having been executed, even if they were illegal, no action would lie in favor of the receiver of the Guthrie Bank.

Thomas v. *Railroad,* 101 U. S., 85;
St. Louis, etc., R. R. v. *Terre Haute, etc., R. R.* 145 U. S., 407;
Pullman Car Co. v. *Transportation Co.,* 171 U. S., 151.

II.

The essential points in this case are covered and have been decided in *Hanover National Bank* v. *First National Bank of Burlingame, Kansas,* (109 Fed., 421).

From the opinions in this case, two suggestions are pertinent: First, the distinction between the purpose for which the loan was made by *Sheldon* in the case cited and the purpose for which the loan was made by Billingsley in this case. In the former, Sheldon obtained the loan for the purpose of preventing the Comptroller of the Currency from knowing the financial condition of the Burlingame Bank. In this case, Billinsgley procured the loan for the purpose of obtaining a credit upon which to "charge off" certain bills receivable of the Capitol National Bank which had been the subject of complaint on the part of the Comptroller of the Currency. The purpose of *Sheldon* was questionable, and that of Billingsley

was without question. Second, applying the views of Judge Caldwell in the dissenting opinion in the case cited, the receiver herein could not and should not recover. So that this case is in harmony with both the majority and dissenting opinions in the case cited. The Circuit Court believed it was controlling, and it is so directly pertinent that we conclude to go further only because of the large amount involved, the vital importance of the case to our client, the direction of the Comptroller of the Currency to prosecute the case to this court, and because many other precedents support the judgment of the Circuit Court and the Circuit Court of Appeals.

Upon the questions as to the power of the Capitol National Bank of Guthrie to make the loan in question, the power and authority of its president, and that the transactions here shown created obligations on the part of the Guthrie Bank to the Kansas City Bank, the case of *Auten* v. *United States National Bank,* 174 U. S., 125, is in point; as is also the case of *Aldrich* v. *Chemical National Bank,* 176 U. S., 618. See also the opinion of Taft, Judge, in the same case, *Armstrong* v. *Chemical National Bank,* 83 Fed., 556, wherein the case before that court in many respects, like that here under consideration, is distinguished from *Western National Bank* v. *Armstrong,* 152 U. S., 346, cited by plaintiff in error.

The same question as to the power of a national bank to borrow money was before this court in the case of *Wyman* v. *Wallace,* 201, U. S., 230, in which the rule as stated in the *Aldrich* case was approved, quoted and followed. The court also commented upon the proposition in the case to the effect that all of the stipulations and agreements between the Union Bank and the American Bank were carried out in good faith, and from the language of the opinion we infer that this fact

was forceful in the adjudication as to the validity of the obligation of the American Bank, which was the subject of the suit.

Upon the authority of these cases, the mere taking of the fund arising from the proceeds of the $30,000 note into the general account of the Guthrie Bank was a sufficient receipt of the benefits of the transaction upon which to have based its liability for the obligation created by the note executed to the Kansas City Bank by Billingsley; so that upon this fact alone the transaction became one of like force and effect as if the Guthrie Bank had in fact executed its own note for the $30,000 to the Kansas City Bank.

These decisions are even more convincing when the principles announced are applied to the facts found in this case and to contracts, the avails of which went into the accounts current and money of the Guthrie Bank. We are confident that these decisions are decisive of this case.

The act of the Guthrie Bank in using the proceeds of the loan for the purpose of charging out certain bills receivable, and the subsequent course and conduct of the bank, make of the transaction its direct obligation, and constitute a complete ratification of the acts and contracts of its president in respect to the entire transaction. *Martin* v. *Webb*, 110 U. S., 7.

As bearing upon the question of the acts of Billingsley, the president of the Guthrie Bank, and his powers and authority as such officer, the direct and constructive knowledge of the other officers and directors, this court, in the case last above cited, in speaking of the powers of the cashier of a bank, used the following language:

> Ordinarily, he has no power to discharge a debtor without payment, nor surrender the assets

or securities of the bank. And, strictly speaking, he may not, in the absence of authority conferred by the directors, cancel its deeds of trust given as security for money loaned; certainly not, unless the debt secured is paid. As the executive officer of the bank, he transacts its business, under the orders and supervision of the board of directors. He is their arm in the management of its financial operations. While these propositions are recognized in the adjudged cases as sound, it is clear that a banking corporation may be represented by its cashier, at least where its charter does not otherwise provide, in transactions outside of his ordinary duties, without his authority to do so being in writing or appearing upon the record of the proceedings of the directors. His authority may be by parol and collected from circumstances. It may be inferred from the general manner in which, for a period sufficiently long to establish a settled course of business, he has been allowed, without interference, to conduct the affairs of the bank. It may be implied from the conduct or acquiescence of the corporation, as represented by the board of directors. When, during a series of years or in numerous business transactions, he has been permitted, without objection and in his official capacity, to pursue a particular course of conduct, it may be presumed, as between the bank and those who in good faith deal with it upon the basis of his authority to represent the corporation, that he has acted in conformity with the instructions received from those who have the right to control its operations. Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than from time to time to elect the officers of the bank and to make declarations of dividends. That which they ought, by proper diligence, to have known as the general course of business in the bank,

> they may be presumed to have known in any contest between the corporation and those who are justified by circumstances in dealing with its officers upon the basis of that course of business.

It is wholly immaterial whether the officer of the bank was clothed with direct and explicit authority to make the loan if it appears that the bank of which he was an officer afterwards received the proceeds of the transaction and appropriated the same to its own use. The latter fact being established, it makes no difference as to the nature, character or extent of the authority of the officer of the bank sought to be bound in the premises. *Blanchard* v. *Commercial Bank of Tacoma,* 75 Fed., 249. And in such cases, where the bank has received the benefits of the transaction and appropriated and used the proceeds, it will be estopped from thereafter asserting the invalidity of the transaction by reason of the want of authority of its officers. *Burton* v. *Burley,* 13 Fed., 811, in which case *Sutor,* who was the president of the La Crosse Bank, directed the charge of his personal note to the account of his bank kept in the City National Bank of Chicago, after which the usual reports were made by the City National Bank to the La Crosse Bank, showing the state of the account and this charge. In speaking of the accounts thus reported by the Chicago Bank to the La Crosse Bank, the court used the following pertinent language:

> What security can there be in the business relations between banks if accounts of this kind are not considered conclusive and binding upon the respective banks, unless, indeed, there is a mistake, or it can be shown that there has been a fraud practiced upon the bank against which the charges are made, and that fraud known to the other bank or its officers? Unless that can be done, there would be no safety in the transactions of banks with each

other. One bank would never know what to do on instructions given or a charge made. Here is an "individual" account which one bank has against a particular person. Another bank with which it is transacting business, and with which it has an account, instructs that bank to charge this individual indebtedness to it. The charge is made and the account rendered showing it is done, and the bank which makes the charge knows nothing of any wrong being done, or of any mistake, or of any fraud being practiced by the officers of the bank. That being so, it must foreclose the bank, or else banks must cease doing business with each other. And it ought to be so. Where a bank, established under an act of congress, or any other way, elects its own officers, the men who are interested in the bank—the stockholders, the depositors—ought to be bound by the authorized acts of the officers, or those which appear to be authorized, whether they are or not, and by the general mercantile usage of banks. So that, in any view that I may take of this case, it seems to me that the plaintiff cannot maintain its action; that it must be concluded by the course of this business which has been done.

The monthly and daily reports, and reconcilements between these banks in this case present a continuous recognition by the Guthrie Bank of its contracts, each of which reports brought the existence of the special accounts bearing their balances and interest credits to the knowledge of every officer, and necessarily and legally to the knowledge of every director of the Guthrie Bank.

The same questions decided in *Auten* v. *United States National F[illegible]e, supra,* were before the United States Circuit Court of Appeals for the Eighth Circuit twice. *U. S. Nat. Bank* v. *First Nat. Bank of Little Rock,* 64 Fed., 985; *U. S. Nat. Bank* v. *First Nat. Bank of Little Rock,* 79 Fed., 296.

In the last case (79 Fed., 296), the decision of the

Circuit Court of Appeals was affirmed by the Supreme Court, and in the first case (64 Fed., 985), the judgment of the Circuit Court of Appeals is unreversed and unaffected by the decision of the Supreme Court above cited.

In the case of *Bell* v. *Hanover National Bank*, 57 Fed., 821, *Bell*, as receiver of the First National Bank of Red Cloud, Nebraska, brought suit against the Hanover National Bank to recover the amount of a deposit. After the insolvency of the Nebraska bank, the Hanover bank retained the balance standing to the credit of the Nebraska bank, and the receiver brought suit to recover the amount so retained. The decision of Lacombe, Circuit Judge, is in part as follows:

> The retaining of the balance standing to the credit of the Bank of Red Cloud on the day of its failure was not a transfer of deposit, within the meaning of section 5242, Rev. St. U. S., which apparently contemplates a transfer by the insolvent bank. *Bank* v. *Colby*, 21 Wall, 613. The deposit had been pledged (assuming the contract of February 1, 1890, to be valid) long prior to the commission of the act of insolvency, as collateral to secure the payment of the loans made to the Bank of Red Cloud by defendant. Neither the subsequent insolvency of the bank, nor the appointment of the receiver, destroyed the lien of defendant, nor its right to dispose of the pledge to satisfy the debt thus secured. *Scott* v. *Armstrong*, 146 U. S., 510, 13 Sup. Ct. Rep., 148. The agreement by which deposits with the defendant were pledged as collateral security for the discounted notes does not appear upon its face to be the contract of the Bank of Red Cloud, but the evidence is sufficient to show that such an agreement was made between the defendant bank and Shirey, the president of the Red Cloud Bank, professing to act on its behalf. It is true that no express authority from the board of directors to make such an agreement is shown, but

> the contract is not an unusual one, and authority to make it may be established by proof of the course of business, by the usages and practice which the directors may have permitted to grow up in the business of the bank, and by the knowledge which the board of directors must be presumed to have had of the acts and doings of its subordinates in and about the affairs of the corporation. *Mahoney Min. Co.* v. *Anglo-Californian Bank,* 104 U. S., 194. The evidence in this case abundantly shows that the board left it to the president, as their agent and the bank's to negotiate loans, and make such contracts as to repayment and security as are lawful and usual—sufficiently so, at least, to bind the bank in such transactions with third persons, when the bank has received the benefit of such contract, without objections, for more than a year. *Martin* v. *Webb,* 110 U. S., 7, 3 Sup. Ct. Rep., 428.

How can it be said of the officers and directors of the Guthrie Bank that when they saw, or must have seen, the reports of the "Special" or "No. 2" account, that they were not apprised and notified that some contract existed *in behalf* of their bank *out of which* such deposits arose?

The case of *Coats* v. *Donnell,* 94 N. Y., 168, presents some characteristics similar to this case. The facts were that Mastin, the cashier of the Mastin Bank of Kansas City, when in the city of New York, agreed orally with Donnell, Lawson & Co., the New York correspondent of the Mastin Bank, that if Donnell & Co. would accept certain drafts amounting to $35,000 previously drawn upon it for the accommodation of, and negotiated by, the Mastin Bank, that it, the Mastin Bank, would keep on deposit with Donnell & Co. until maturity of the drafts a balance equal to the amount; and that Donnell & Co. should have a lien on such balance as security, with the right to charge the account at any

time with the acceptances and appropriate to their payment so much of the deposits as should be necessary. Donnell & Co. accepted drafts and the proceeds were shortly after deposited with them by the Mastin Bank. After the Mastin Bank had made an assignment, Donnell & Co. charged up the acceptances and appropriated the deposit to meet the drafts. In a suit by the assignee of the Mastin Bank to recover the deposits so appropriated, *it was held* that the cashier, under his general authority and under a by-law of the bank which gave him charge and supervision of the bank, with power to make loans, had power to make the agreement, and that the appropriation was lawful. That Donnell & Co. by reason of the agreement held a prior lien upon the deposit so made to meet the drafts, and that in equity the rights of Donnell & Co. were superior to those of other creditors of the Mastin Bank. That although the appropriation occurred after the assignment, Donnell & Co. had the right to make the appropriation under the agreement and charge the account of the Mastin Bank with the face of the drafts, and to hold that amount to meet the sum which they were bound to pay under the agreement, at the maturity of the drafts.

It is urged by plaintiff in error that the notes having been signed by Chas. E. Billingsley individually, that, therefore, the obligations were not those of the Guthrie bank. Upon this question, the case of *Jones* v. *Williams,* 139 Mo., 1, is in point, in which the contract between Jones and Joseph Pulitzer was signed by the parties in their individual names. Pulitzer was a large stockholder in, and the president of, the Post-Dispatch Company, and it was contended that the contract was not sufficient to bind the Post-Dispatch Company, a corporation, because it was signed by Pulitzer individually. Upon this question the Court says:

Assuming that Pulitzer had the power to bind the corporation, it sufficiently appears from the contract itself, from what was done under it, and from all the circumstances connected with the transaction, that he intended to bind the company, and that the plaintiff supposed he was dealing with Pulitzer as one who had authority to act for the corporation. The parties who signed the contract unquestionably intended that the corporation should be bound. It can always be shown in case of natural persons, that one who signed a contract, such as this, in his own name, did so as agent for another. Where authority exists the question is one of intention. The same doctrine is applicable to corporations. *Melledge* v. *Boston Iron Company*, 5 Cush., 173; *A. P. Trust Co.* v. *Taylor Mfg. Co.*, 46 Fed. Rep., 152; *Sparks* v. *Dispatch Co.*, 104 Mo., 547.

It was not necessary, therefore, that the authority of Pulitzer should have been recited in the contract, or that the corporate name should have been signed to it, or that the official designation of Pulitzer should have been added to his signature.

The same question arose in the case of *American Preservers Trust* v. *Taylor Mfg. Co.*, 46 Fed., 152, in which case a contract was signed by individual stockholders, and it was alleged that the corporation received thereby the proceeds of the sale of certain Trust certificates. Upon the proposition as to whether the contract was binding upon the corporation, although not signed in its name, but in the name of certain individuals, who were stockholders of the corporation, *Thayer*, Judge, in the opinion says:

When a contract is one which a corporation is empowered to make, and has in fact authorized to be made for its benefit, but in the name of some other person or persons, it may be held liable thereon. So far as natural persons are concerned, it is usually immaterial by what name they see fit to evidence their assent to a contract, providing they

do assent and intend to become bound; and the same doctrine has been held applicable to corporations. *Melledge* v. *Iron Co.*, 5 Cush., 158; *Carroll* v. *Society*, 125 Mass., 565.

If Billingsley, the president of the Guthrie Bank, had authority to borrow money for the use and benefit of the bank, and did so by giving his individual note, and thus procured the money for the Guthrie bank, the Guthrie bank is liable, and such contract may be enforced against it, and it makes no difference whether the Board of Directors formally conferred any authority upon Billingsley to transact the business in the manner in which he did transact it. The case of *Jones* v. *Williams*, 139 Mo., page 1, is pertinent upon this proposition. In that case the contract was made by Pulitzer, the president of the Post-Dispatch Company. And upon the question as to whether he had authority to bind the corporation in respect to the obligations created by the contract, the Court says:

> A corporation may be described as being an artificial being, existing only in contemplation of law; a legal entity, a fictitious person, vested by law with the capacity of taking and granting property and transacting business as an individual. It is composed of a number of individuals authorized to act as if they were one person. The individual stockholders are the constituent or component parts, through whose intelligence, judgment and discretion the corporation acts. The affairs of a corporation can not, in many cases, be conveniently conducted and managed by the stockholders, for they are often numerous and widely separated. Yet they, in reality, compose the body corporate. "It is their acts, when done in the manner prescribed in the constitution of the corporation, that are, properly speaking, acts of the corporation." Taylor on Corp., Sec. 50; Morawetz on Corp., Sec. 1.
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> At common law the power to have a board of

directors was inherent in the corporotion. The statute of Missouri requiring the business and property of a corporation to be managed and controlled by directors, is but an affirmance of the common law power. So likewise the directors have the power, without statutory authority, to delegate to officers, agents or executive committees the power to transact, not only ordinary and routine business, but business requiring the highest degree of judgment and discretion. Thus authority to manage the business of railroad corporations, insurance companies, banking institutions and other corporations having large and complicated business interests, is usually delegated by the directors to agents, often, but not necessarily, officers of the corporation. These agents, or managing officers, have incidental power to employ all assistants and to do all acts necessary to properly conduct the business over which they are given charge. Formal action of the board of directors is not necessary in order to confer the authority.

The power expressly given by statute to the board of directors "to appoint such subordinate officers and agents as the business of the corporation may require," does not limit or diminish the common law power to delegate authority. The directors represent the impersonal corporation completely, in the business it is authorized to transact, and have the power to do, or cause to be done, whatever they as individuals could do if the business were their own. They act as the corporation itself, as well as under a delegated authority from it. Beach on Priv. Corp., Sec. 227. The power of directors to delegate authority to officers and agents has been recognized by this court in many cases. *Bank* v. *Gilstrap*, 45 Mo., 419; *Sparks* v. *Dispatch Co.*, 104 Mo., 531; *Moor* v. *Gaus & Sons Mfg. Co.*, 113 Mo., 106; *First Natl. Bank* v. *N. Mo. Co.*, 86 Mo., 125.

"If directors, or other corporate agents, do an act which is not beyond the scope of the corporate powers, the question whether the act is binding on the corporation and all persons interested in the

corporate enterprise may be usually solved by the ordinary rules of agency. Taylor on Corp., Sec. 193; *Hatch* v. *Coddington*, 95 U. S., 48; *Railroad* v. *Dixon*, 114 N. Y., 85.

It is said by GANTT, J., in *Gaus & Sons Mfg. Co., supra*: "The power of an agent or officer of a corporation to bind his principal is governed by the law of agency, and where an officer has been permitted to manage all the business of a corporation, his authority to bind it will be implied from the apparent power thus conferred upon him."

The president of a corporation is its executive officer. Within the scope of his duties, as the head of the corporation, he has the power to act without direct authority of the directors. Indeed, it has been held that "the president being the legal head of the body, when an act is performed by him, the presumption will be indulged that the act is legally done, and is binding upon the body." *Smith* v. *Smith*, 62 Ill., 493.

However that may be, "there can be no doubt," says Morawetz, "that the board of directors may invest the president with authority to act as chief executive officer of the company. This may be done either by an express resolution, or by acquiescence in a course of dealing. A person dealing with the president of a corporation in the usual manner, and within the powers which the president has been accustomed to exercise, without the dissent of the directors, would be entitled to assume that the president had actually been invested with those powers." Morawetz on Corp., Sec. 538.

This corporation was organized for pecuniary profit and gain. For the purposes contemplated the entire business and property may be entrusted to certain officers and agents with authority to manage and control the same. Certain acts, which do not pertain to the business, must be performed by the stockholders or directors, such as increasing the capital stock, declaring dividends, etc.

Entrusting the president with the management

of the entire business is not the delegation of corporate rights and powers, but is a mere authorization of the president to perform, for and in the name of the corporation, the business it is authorized to transact.

The contract between Billingsley, president of the Guthrie Bank, and the Kansas City Bank in providing for a special account or deposit is sanctioned by statute (U. S. Rev. Stat., Sec. 5228) and is supported by the decisions of this court. *National Bank* v. *Graham,* 100 U. S., 699, followed in *Whitney* v. *National Bank,* 154 U. S., 664. The special deposit in this case comes under that class of special deposits made for the purpose of security, and a national bank may become the repository of the fund which is to stand as security and to be paid or applied under certain contingencies. *Bushnell* v. *National Bank,* 74 N. Y., 290; *Sykes* v. *National Bank,* 2 S. Dak., 442. And when such special deposit is created, the bank receiving the same is obligated to apply it to the payment of the designated indebtedness. *Judy* v. *Farmers etc. Bank,* 81 Mo., 404. A deposit is always presumed to be general unless made special by contract. *Commonwealth Bank* v. *Wister,* 2 Pet. (U. S.), 318; *Brahm* v. *Adkins,* 77 Ills., 263. It requires a contract between the parties to create a special deposit; otherwise, it will be general. *Bank of the Republic* v. *Millard,* 10 Wall., 152; *Bank of Blackwell* v. *Dean, Assignee of Bank of Kildare,* 9 Ok., 626.

Applying these principles to this case, two pertinent propositions may be deduced: First, the Guthrie Bank recognized and acted upon the part of the contract contained in the letter by which the special account or special deposit was entered and made, and it required such contract to impress the proceeds or amount of money named in the Billingsley notes so as to bring into existence such

special deposits. Second, that the Kansas City Bank, after it had created the special deposit and set apart upon its books the specific amounts as security for the payment of the Billingsley notes, could not depart from the agreement in that respect, and it was thereafter obligated to do just what it did do, viz.: Apply the amounts contained in the special deposit towards the satisfaction of the notes and its right to do so arose and became obligatory upon it by virtue of the contracts.

Upon the question as to whether the loan was made for the benefit of the Guthrie Bank, it is insisted that the transaction was that of Billingsley and for his individual use and benefit. The position of the plaintiff in error in this respect is contrary to the findings of fact and cannot be predicated thereon. Who was it that wanted this loan? What was the loan wanted for? Was Billingsley being criticised by the United States Government on account of excessive loans? Who was it that spoke when the Kansas City Bank was asked to make the loan for the purposes indicated in the first Billingsley letter? The Comptroller of the Currency was criticising and demanding the charging off of the excessive loans. There was no criticism against Billingsley, nor assertion of any personal obligation against him, nor do the facts as found show that Billingsley profited personally by the making of the loan. It is not shown that he in the transaction was to personally become the owner of the loans to be charged off. The first letter and all subsequent letters show that the money was obtained for direct use by the Guthrie Bank. Its conduct of the business and use of the proceeds thereafter show that it so understood it. The checks of Billingsley were means adopted to place the fund in the Guthrie Bank for its use. They are not a part of the contract, but relate to the machinery used in its performance. The handling of the fund

through the personal account of Billingsley proves nothing under the fact as found, that the Guthrie Bank used that account as a repository for its borrowed money. This proposition is so plain under the findings that no argument should be necessary.

It is also contended that the Guthrie Bank did not have the power to borrow money through its president, Billingsley, by the discount of, or upon the notes signed by him personally. Upon these two propositions the case of *Western National Bank* v. *Armstrong*, 152 U. S., 347, is cited and the power of the Guthrie Bank and authority of Billingsley to make the contracts shown in this case is predicated upon the principles as announced in that and similar cases. A brief review of the authorities will show that this decision, even if it is the law and not overruled, is inapplicable. We have heretofore cited the cases of *Auten* v. *United States National Bank*, 174 U. S., 125; *Aldrich* v. *Chemical National Bank*, 176 U. S., 618, and *Armstrong* v. *Chemical National Bank*, 83 Fed., 556. The *Armstrong* case and the *Aldrich* case are the same, and both refer to, and we think, criticise the rule announced in the *Western National Bank* case, so far as it relates to the power of a national bank to borrow money without special authority of its board of directors, and under these decisions the *Western National Bank* case is in no way authority in a case such as disclosed by the findings of fact here. In the *Aldrich* case this court says:

> From that decree the receiver has appealed to this court—the present appellant having succeeded Armstrong.
>
> The principal contention of the appellant is that under the principles announced in *Western National Bank* v. *Armstrong*, the Fidelity National Bank incurred no liability on account of the money obtained from the Chemical National Bank. But the appellee

insists that the language of this court in that case, so far as it relates to the power of a national bank as incidental to its business to borrow money, was much broader than was necessary for the determination of the issues then before the court, and, if interpreted as is done by the appellant, is in conflict with the adjudged cases, inconsistent with sound principle, and should be modified. In the last named case the Western National Bank of New York alleged that the Fidelity Bank was indebted to it on account of a loan made May 28th, 1887, "at the special instance and request of E. L. Harper, who was then the vice president and general manager of the said Fidelity National Bank, with full authority to make said loan on its behalf," and which loan, it was further alleged, was secured by collateral, signed by one Gahr and indorsed by Harper, and by the indorsement and delivery to the Western Bank by Harper, of certificates for 1,600 shares of the capital stock of the Fidelity Bank. It was also alleged that the collateral was without value, and that the stock was wholly invalid and void. The Fidelity Bank denied that the Western Bank made any loan to it, or that it had any connection with or interest in the transaction referred to in the bill. The pleadings and evidence raised the question whether Harper, in his transactions with the New York bank, could legally bind the Fidelity Bank of which he was vice president. This court said: "It may be conceded that the New York bank acted upon the theory that the loan was to the Ohio bank, and took the notes and certificates of stock as collateral. But the liability of the Ohio bank is not a necessary consequence of such a concession. It has further to be shown that the Ohio bank was really a party to the transaction, either by having authorized Harper to effect the loan on its behalf, or by having ratified his action and having accepted and enjoyed the proceeds of the discount. There is no evidence whatever that the board of directors of the Fidelity National Bank gave any authority to Harper to borrow money on

behalf of the bank, much less to borrow so enormous a sum on so long a time. In this respect the complainant's case stands barely on the assertion in the bill that 'Harper was the vice-president and general manager of the Fidelity National Bank, with full authority to make said loan on its behalf.' "The only evidence we find in the record tending to support such averment is found in the answer by J. Harvey Waters, the general bookkeeper of the Fidelity National Bank, on cross-examination, wherein he stated that E. L. Harper was the vice-president and managing officer, and that by 'managing officer' he meant that Harper was 'the general manager of the business of the bank.' No such officer as that of 'general manager' is known or named in the national bank acts, nor does any such office exist by usage. The most that can be claimed in this case is that Harper acted as the principal executive officer of the bank. It cannot be pretended that, as such, he had power, without authority from the board, to bind the bank by borrowing $200,000 at four months' time. It might even be questioned whether such a transaction would be within the power of the board of directors. The powers expressly granted are stated in the 8th section of the National Bank Act (Rev. Stat., 5136, p. 7): A national bank can 'exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes." The power to borrow money or to give notes is not expressly given by the act. The business of the bank is to lend, not to borrow; to discount the notes of others, not to get its own notes discounted. Still, as was said by this court in the case of *First Nat. Bank* v. *National Exch. Bank*, 92 U. S., 122, 127, 23 L. ed., 679, 681, "authority is thus given in the

act to transact such a banking business as is specified and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others." Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money. Even, therefore, if it be conceded that it was within the power of the board of directors of the Fidelity National Bank to borrow $200,000 on time, it is yet obvious that the vice president, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers. Without pursuing this part of the subject further, we think it evident that Harper had no authority to borrow this money, and that the bank cannot be held for his engagements even if made in behalf of the bank, unless ratification on the part of the bank is shown.

In the view we take of the present case it is not necessary to extend this opinion by a review of the numerous authorities which, it is contended, support the general proposition that a national bank is entitled under the law of its creation and in the conduct of its business to borrow money, and that the lender is not obliged to show that the officer or agent acting for the bank had special authority to negotiate the loan. If the present case depended upon that question it might be necessary to consider whether the language in *Western Natl. Bank* v. *Armstrong* required modification.

It may be well, however, to observe that this court, in *Auten* v. *United States Nat. Bank*, 174 U. S., 125, 141, 143, 43 L. ed., 920, 926, 927, 19 Sup. Ct. Rep., 628, 635, held that the borrowing of money was not out of the usual course of banking business. We said: "A power so useful cannot be said to be illegitimate, and declared as a matter of law to be out of the usual course of business, and to charge everybody connected with it with knowledge that it may be in excess of authority. It would seem, if doubtful at all, more like a question of fact, to be resolved in the particular case by the usage of the parties or the usage of communities." It is important also to observe that the court said that *Western Nat. Bank* v. *Armstrong* was not to be regarded as an adjudication to the contrary.

We may further observe that the last named case differs from the present case in many important particulars.

In *Western Nat. Bank* v. *Armstrong*, the defendant bank did not receive or get the benefit of the money alleged to have been loaned to it at the instance of its vice-president. This court took care in that case to say that it did "not appear that the bank ever got a penny of the borrowed money or any benefit or advantage whatever by reason of the transaction."

In the opinion of Taft, Judge, in the *Armstrong* case (83 Fed), the applicability of the *Western National Bank* case to the facts in this case, showing that the Guthrie Bank received the benefits of the transaction is clearly pointed out in the opinion, and the effect of notice to the Guthrie Bank from time to time in monthly statements upon a transaction of this character is thus stated in the opinion:

The effect of notice through monthly statements made in due course by one bank to another of unauthorized transactions of agents is clearly shown in the case of *Kissam* v. *Anderson*, 145 U.

S., 435, 12 Sup. Ct., 960. In that case the cashier of a country bank drew bank drafts on its New York correspondent bank in favor of New York brokers, who were conducting a speculation for him. The country bank failed, and its receiver sued the brokers for the money of the bank, because received by them on these drafts with knowledge that the cashier was using the funds of his bank for private speculation. The brokers sought to have the claim reduced by deposits which they had made to the credit of the country bank with its New York correspondent by direction of their client. It appeared that the New York correspondent sent regular monthly statements of the deposit account to the country bank, showing these credits, but they were not transferred to the books of the country bank, and some of the accounts thus sent were not even opened. The cashier drew new drafts on these deposits and squandered the money elsewhere. The circuit court held that unless it appeared that these deposits actually reduced the sum total of the cashier's total defalcations, by whatever means, below the amount of the drafts received by defendants, they could not set off the deposits returned by them. The Supreme Court, in an opinion by Mr. Justice Brewer, reversed the judgment of the circuit court. He said:

"Defendants returned this money to the Albion Bank. They deposited it with the Third National Bank, the correspondent of the Albion Bank, and the bank from which they received the money on the checks from the Albion Bank. In fact, therefore, the money was placed where it was before it was taken—in the possession and under the control of the Albion Bank. Not only that, the Third National Bank, in its due course of business, by monthly reports, informed the Albion Bank that they had received this money, and held it subject to its order; and it was subsequently used by the Albion Bank in drafts drawn by it in favor of other parties. If it be said that no officer of the Albion Bank knew

of these deposits except Warner, the wrongdoer, and that he subsequently drew out most of these moneys in drafts to further other wrongs, the reply is that the other officers and directors of the Albion Bank were chargeable with knowledge of these deposits. If, through their negligence, they did not in fact know, that is a matter for which the Albion Bank, and not the defendants, were responsible. Kissam, Whitney & Co. had no supervision over its affairs—no knowledge as to how those affairs were managed. They were not called upon to go to Albion and hunt up the various officers and directors and inform them, one by one, personally, that these moneys had been deposited to their credit in the Third National Bank. It was enough that they deposited them, and that that bank, in regular course of business, by monthly statements, informed the Albion Bank that it received and held those moneys. * * * It will not do to say that they put the money where he could check it out, and therefore are responsible for what he did with it. They deposited it to the credit of the Albion Bank, and it was for the officers and directors of that bank to take care of its deposits. The rule might be different if Warner, the cashier of the Albion Bank, was the only officer authorized to draw on the Third National Bank, or charged with knowledge of the state of account; but the president and teller had equal authority, and were equally chargeable with knowledge. In fact, it appears that these officers did draw drafts on the New York bank, and thus diminished the total amount of deposits, and the other directors, also, were under some obligation to know the affairs of the bank; and it will not do to say that the bank can ignore the negligence of all its officers and profit by their omission of duty."

The same effect was given by Judge Drummond to monthly accounts current between correspondent banks in *Burton* v. *Burley*, 13 Fed., 811, where a bank president had paid his personal debts by directing charges to be made upon the correspondent bank's books against his own bank.

Again in the *Auten* case, this court had occasion to point out the inapplicability of the *Western National Bank* case to facts such as those found here, and to further discuss the powers conferred upon the officers of the bank, either by express authority, usage, or a course of business. In the opinion this court, for the purpose of clearing up the uncertainty arising by reason of the decision in the *Western National Bank* case, used the following language:

> Banking in much, if not in the greater part of its practice, is in strict sense borrowing, and we may well hesitate to condemn it as illegitimate, or regard it as out of the course of regular business, and hence suspicious and questionable. "A bank," says Morse (Sec. 2, Banks and Banking), "is an institution usually incorporated with power to issue its promissory notes intended to circulate as money (known as bank notes); or to receive the money of others on general deposit to form a joint fund that shall be used by the institution *for its own benefit*, for one or more of the purposes of making temporary loans and discounts; of dealing in notes, foreign and domestic bills of exchange, coin bullion, credits, and the remission of money; or with both these powers, and with the privileges, in addition to these basic powers, of receiving special deposits and making collections for the holders of negotiable paper, if the institution sees fit to engage in such business."
>
> This defines the functions: what relations are created by them? Manifestly those of debtor and creditor—the bank being as often one as the other.
>
> A banker, Macleod says, is a trader who buys money, or money and debts, by creating other debts, which he does with his credit—exchanging for a debt payable in the future one payable on demand. This, he says, is the essential definition of banking. "The first business of a banker is not to lend money *to* others, but to collect money *from* others." Macleod, Banking, Vol. 1, 2d ed., pp. 109, 110. And Gilbart defines a banker to be a "dealer in capital, or

more properly a dealer in money. He is an intermediate party between the borrower and the lender. He borrows of one party and lends to another." Gilbart, Banking, Vol. 1, p. 2.

The very first banking in England was pure borrowing. It consisted in receiving money in exchange for which promissory notes were given payable to bearer on demand, and so essentially was this banking as then understood, that the monopoly given to the Bank of England was secured by prohibiting any partnership of more than six persons "to borrow, owe, or take up any sum or sums of money on their bills or notes payable at demand." And it had effect until 1772 (about thirty years), when the monopoly was evaded by the introduction of the deposit system. The relations created are the same as those created by the issue of notes. In both a debt is created—the evidence only is different. In one case it is a credit on the banker's books; in the other his written promise to pay. In the one case he discharges it by paying the orders (checks) of his creditor; in the other by redeeming his promises. These are the only differences. There may be others of advantage and ultimate effect, but with them we are not concerned.

But it may be said these two views are elementary and do not help to a solution of the question presented by the record, which is not what relation a bank has or what power its officers may be considered as having in its transactions with the general public, but what is its relations and what power its officers may be considered as having in its transactions with other banks. Indeed, the question may be even narrower—not one of power, but one of evidence. If so, the views expressed are pertinent. They show the basis of credit upon which the banks rest, and the necessity of having power to support it; maybe to extend it. Borrowing is borrowing, no matter from whom. Discounting bills and notes may require rediscounting them; buying bills and notes may require selling them again. Money may

not be equally distributed. It is a bank's function to correct the inequality. The very object of banking is to aid the operation of the laws of commerce by serving as a channel for carrying money from place to place, as the rise and fall of supply and demand require, and it may be done by rediscounting the bank's paper or by some other form of borrowing. *Curtis* v. *Leavitt*, 15 N. Y., 1; *First National Bank* v. *National Exchange Bank*, 92 U. S., 122 (23; 679); *Cooper* v. *Curtis*, 30 Me., 488.

A power so useful cannot be said to be illegitimate, and declared as a matter of law to be out of the usual course of business, and to charge everybody connected with it with knowledge that it may be in excess of authority. It would seem, if doubtful at all, more like a question of fact, to be resolved in the particular case by the usage of the parties or the usage of communities.

The three cases of *Auten*, *Aldrich* and *Armstrong* above cited also emphasize the importance in determining the relations between the banks, the facts constituting the transactions, in this case of considering and applying the statements contained in the correspondence. It is from these cases that the Circuit Court, in making the statement of facts, adopted the plan of specifically setting forth the correspondence and the entries and accounts in the two banks. These cases also serve to point the distinction between this case and that cited and quoted by plaintiff in error, *Chrystie* v. *Foster*, 61 Fed., 551. The following quotation, not made by counsel in their brief, serves to illustrate the same distinction. In the opinion the following language is used:

> If Collins had used his note with the defendants to procure an advance to the bank for its benefit, and not for his own, and had given them such an authorization, very different questions would be presented from those which are now in the case.

The case of the *State Nat. Bank* v. *Newton Nat.*

Bank, 66 Fed., 692, is also upon its face clearly inapplicable, as will be seen from the following quotation:

> The answer of the defendant bank to said complaint admitted the execution and sale of the notes to the St. Joseph Bank, but it alleged the fact to be that said notes were executed for the accommodation of the payee therein named, to-wit, the McClain Live Stock & Investment Company, in pursuance of an arrangement between said payee and the St. Joseph Bank, whereby the latter was to discount, and did in fact discount, the notes for the sole benefit of the payee, and not for the benefit of the Newton Bank.
>
> Upon the state of facts disclosed by the answer and admitted by the motion, the case presented for decision was not one in which a bank cashier had assumed to borrow money for the use and benefit of his bank, but it was one in which he had attempted to use the credit of the bank to secure a discount of his own notes, for the benefit of a third party.

The case of *Lamson* v. *Beard*, 94 Fed., 30, has been cited, but upon examination of the case, it will appear that it is likewise inapplicable. The facts were that one Cassatt, president of the First National Bank of Pella, issued and sent drafts by mail to Lamson Bros. & Co. in response to their demand, in order to maintain his margins upon speculative transactions in futures on the Board of Trade in Chicago, which purchases of futures aggregated a large amount, and were upon the individual account of Cassatt, the president of the Pella Bank. The transactions so far as they affected the bank of which Cassatt was president were known alone to Cassatt, and, while they appeared upon the books, they were purposely kept in a manner to conceal the truth. The acts of Cassatt, as expressly found, were theft and embezzlement, and were in nowise transactions in behalf of or for the

benefit of the bank. From this statement it sufficiently appears that the case in no respect resembles the case existing upon the facts found herein. The case of *Anderson* v. *Kissam*, 35 Fed., 699, is cited and an extended quotation made therefrom. The decision of the lower court so cited and quoted was, however, *reversed* in *Kissam* v. *Anderson*, 145 U. S., 435, in which BREWER, Judge, in delivering the opinion of this court took a contrary view to that of the court below, and in deciding the case announced the principle that it will not do for a bank to ignore the negligent or other acts of its officers and profit by their omission of duty. Applying the principles of this decision to the case at bar, it is forceful to the effect that by the sending of monthly reports to the Guthrie Bank, the officers and directors of that bank were charged with notice of the special account and deposits and by the exercise of reasonable or ordinary care could have ascertained that the money so deposited arose from the proceeds of the Billingsley notes.

The case of *Rankin* v. *Chase National Bank*, 188 U. S., 577, cited by plaintiff in error, is the same case as *Gale* v. *Chase National Bank*, 104 Fed., 214, and 108 Fed., 987. The controversy was in reference to $8,000 of currency taken by Bush from the funds of the National Bank of Elmira, of which he was cashier, and the making of a draft of $7,000 on the Philadelphia correspondent of the bank of which he was cashier, and delivering the same to the Chase National Bank in payment of *his individual debt to that bank*. Bush, the cashier of the Elmira Bank, had borrowed for his individual account from the Chase Bank a sum of money and evidenced the debt by his demand note secured by stock of the Elmira Bank as collateral; this debt amounted to about $15,000. He took from the Elmira Bank, of which he was cashier, $8,000 in currency, and a draft on

the Philadelphia correspondent of the Elmira Bank for $7,000, and offered the currency and draft to the Chase Bank in payment of his individual debt. The currency was credited to the account of the Elmira Bank in the Chase Bank, and the $7,000 draft payable to Bush was taken for collection and afterwards collected and placed to the credit of the Elmira Bank. These two items were not accepted in payment of the debt of Bush, but a certified check executed and certified by him as cashier when in Philadelphia for $15,012.50 was accepted. The question as to the validity of the transaction concerning the certified check, as well as that concerning the currency, were not before this court, and the adjudication turned upon the right of the Chase Bank to the $7,000 collected upon the draft which had been changed so as to make it drawn by the cashier of the Elmira Bank and payable to himself as cashier. There is nothing in the case cited which bears directly or indirectly upon the questions here involved; and even if it were so, the fact that Bush, as cashier of the Elmira Bank, was engaged in *paying his individual obligation* would sufficiently distinguish it.

The case of *Park Hotel Co.* v. *Fourth National Bank of St. Louis,* 86 Fed., 742, grew out of the execution of the note of the Park Hotel Company by one Hogaboom, president, *payable to himself* and upon which he *received all of the proceeds.* The hotel company *received no part of the consideration,* and the Fourth National Bank knew it.

The case of *Farmers' Loan & Trust Co.* v. *Fidelity Trust Company,* 86 Fed., 541, arose upon a transaction, by which an agent asked and received a certificate of deposit, *in his own name, for moneys of his principal, for his individual use,* and the bank was in possession of sufficient knowledge to put it upon inquiry as to why the agent wanted the certificate so issued.

The case of *Germania Safety Vault & Trust Co.* v. *Boynton*, 71 Fed., 797, was a transaction beyond the power of the corporation and *ultra vires* in the sense that the corporation had no authority or power expressly granted or arising by implication to lend its credit to another, and the transaction was otherwise a use of the bonds of the corporation for the *private purposes* of Herman and Park.

These and other cases have been cited by plaintiff in error's counsel in their brief as applicable to legal propositions arising herein. It is sufficient to merely glance at the authorities to see that they can have no application to this case, based as it is upon transactions directly for the use and benefit of the Guthrie Bank, and which in all particulars were within the knowledge of all of the officers of the bank continuously from the time of inception until consummation. It has been urged that the transactions were beyond the power of the Guthrie Bank. Upon this question we need go no further than to the simple proposition as to *whether the Guthrie Bank had power to borrow money*. That it had such power has been settled in numerous cases and is no longer a question of controversy or doubt. There is a marked distinction between corporate acts which are *wholly outside of the corporate powers of the corporation*, and the acts of corporations, their agents or officers, *which are within the power of the corporation* but exercised irregularly by the corporation itself, or by its officers, and beyond the scope of their official positions. The first class of acts are absolutely null and void for *want of power*, and there can be no ratification for like want of power, and in all federal jurisdictions the receipts of the benefits of such transactions do not bind the corporation, because there is no power to receive the benefits. There are many decided cases on this branch of the question, and *Central*

Transportation Co. v. *Pullman Palace Car Co.*, 139 U. S., 24, we believe to be the leading case. This, and other cases of like character, have been cited and quoted by counsel for plaintiff in error in their brief. The inapplicability of such precedents is at once apparent when it is considered that the transactions here involved are the borrowing of money by the Guthrie Bank from the Kansas City Bank and the making of the contracts in question, all of which were within the *corporate powers* of the Guthrie Bank.

In the second class of cases, where corporate authority or power is irregularly exercised, very different legal principles apply. In this class of cases, while corporations will be held to a proper and legal exercise of their powers, they are held bound *like individuals* in any case in which an individual might be bound. They may be estopped, they may ratify, and they may be bound by receipt and use of the fruits of irregular or unauthorized acts of their officers or agents; in such case, they will not be heard to assert a want of power or authority in their officers and agents, or any want of formal or technical methods in the corporate management, and while corporations act by a board of directors, yet such board must know what is going on, and it never has been the rule that a corporation can, with knowledge of the transaction, actual or constructive, cloak itself from the unpleasant and disastrous acts of its officers *because its board of directors did not formally meet and act. Martin* v. *Webb*, 110 U. S., 7; *Jones* v. *Williams*, 139 Mo., 1.

Viewing the contracts as they are shown in the findings of fact, there is no foundation for the assertion of counsel for plaintiff in error that Billingsley could not act for himself and his bank in a matter in which they were adversely interested. There is no legal foundation in the case for such a proposition, as Billingsley was

by all of his acts obtaining money for the Guthrie Bank and not for himself. The proposition that an agent may not legally act for himself and his principal in the same transaction is doubtless sound, but how can it be made applicable to the contracts in this case?

III.

The acceptance and receipt of the benefits, advantages and profits of the contracts preclude and estop the Guthrie Bank from asserting that they were not made in its behalf.

The plaintiff in error has made the broad assertion that the doctrine of estoppel is not involved in this case, that the facts do not warrant it. The answer of the defendant contains the following allegation: (Record, page 11.)

> And this defendant further says and avers that it is informed and believes and charges the fact to be that the said Guthrie Bank accepted said special deposit and availed itself of the advantages and profits thereof, and fully accepted, ratified and confirmed each and all of the said contracts and agreements so made by its president in its behalf as aforesaid, and said contracts were fully performed by the parties thereto and in exact accordance therewith.

As will be seen from the authorities, the principles of estoppel are involved in the case, and the acts of the Guthrie Bank are conclusive against it and fully establish such estoppel. What does it mean but estoppel for the Guthrie Bank to *accept the special deposit* and *avail itself of* the *"advantage"* and *"profits"* thereof? While

ratification of the contract is not strictly estoppel, there is a close similarity. And what principle of estoppel can be more fully found than that in cases where an unauthorized contract has been fully performed by the parties for whose benefit it was made? It is a mere begging of the question to say in this case that no estoppel appears. It needs no citation of authorities upon the proposition that taking a beneficial interest under a contract will estop such party so benefited from asserting that the contract does not exist and is not binding. Banks are bound where they receive money from a depositor and credit him therewith. In doing so, an implied contract is made to honor the depositor's check and an estoppel arises against alleging that the money deposited belongs to some one else. *Lock Haven First National Bank* v. *Mason,* 95 Pa. St., 113. It follows that the Kansas City Bank was bound in favor of the Guthrie Bank when it created the special deposit. All of the terms of the Billingsley contract entered into that transaction. It is equally true as a general proposition that when the Guthrie Bank availed itself of the special deposit and received the money therein, and placed it in its general account, that it cannot be heard to deny the existence of the contract under which the special deposit arises. It matters not what the transaction may be called. It is the *acts of the parties* that constitute this kind of estoppel. This doctrine is announced and relied upon frequently in the cases cited and quoted heretofore in this brief. A large number of cases support these propositions. SHERWOOD, C. J., in *Roe* v. *Bank of Versailles,* 167 Mo., 406, l.c., 424, has aptly stated the law in the following language:

> The president of a business corporation is its chief executive officer. He may, without any special authority from the board of directors, perform

all acts of an ordinary nature, which, by usage or necessity, are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of business, (Boone on Corp., Sec. 144; *Stokes* v. *Pottery Co.*, 46 N. J., L. 237).

But apart from direct authority, owing to, and arising from, official position, it does not lie in plaintiff's mouth, after having borrowed the money from the bank, through the president, now to deny the authority of the president either to loan the money to him or to dictate the terms of such loan. If the plaintiff's position be correct, that the president had no authority to loan the bank's money, then it inevitably follows that plaintiff *never got the money from the bank at all,* and consequently, *had no money in the bank to draw on,* and therefore had no ground of action against *the bank* for not honoring his checks. In other words, plaintiff's position on this point, if successful, would cause the bottom to drop out of his cause of action. Not only is plaintiff estopped from pleading the president's lack of power in this regard, but the *bank itself,* having let the plaintiff have its money, through the assumed agency of its president (if it was assumed) is also estopped to deny the legitimate nature of the loan. And in the absence of countervailing evidence inasmuch as the bank's books show the loan was made, it will be presumed that the nature and character and all the essential features of the loan were made known to the bank, and as no disapproval by the bank of the loan appears, it will be presumed the bank approved of the loan in all points and particulars, for this is the ordinary presumption of law, and the usual course of business. (*Long* v. *Joplin Mining Co.*, 68 Mo., 422; *Breckenridge* v. *Ins. Co.*, 87 Mo., loc. cit. 71; Story on Agency, Sec. 140; *Lenox* v. *Harrison*, 88 Mo., loc. cit. 496, and cas. cit.)

And, on another ground, even if the act of the president were wholly unauthorized, that act can

be upheld, and that is on the basis of ratification, which is as effectual against a corporation as against an individual in like circumstances, and tantamount to prior authorization. (*Bank* v. *Fricke*, 75 Mo., 178, and cas. cit.; *Bank* v. *Gay*, 63 Mo., 33.)

IV.

The propositions of fact urged by plaintiff in error are contrary to the findings, and the legal propositions and authorities cited are not applicable to this case.

(a) The case of *Sparks* v. *Despatch Transportation Co.*, 104 Mo., 531, is cited and quoted upon the proposition that it is incompetent to show that the promissory notes of Billingsley were other than his individual obligations. Other cases are also cited, but they are taken from the opinion quoted almost entirely. *This is not an action upon a promissory note.* We need not question the authority of the cases cited in actions to which the principle applies. The plaintiff sues in this action to recover a *special deposit.* The suit is between the original parties to the transaction—not upon a negotiable instrument that has found its way into the hands of third parties or innocent holders. The suit is based upon special contracts under which special deposits were created, and the inquiry as to whether or not the notes of Chas. E. Billingsley were his individual obligations does not arise. The question that does arise is as to whether the contracts and notes were executed and delivered to the Kansas City Bank for the use and benefit of the Guthrie Bank, so that this suggestion of plaintiff in error's counsel is clearly outside of this case.

(b) It is asserted that the Kansas City Bank had notice during the negotiation of this loan that the debt was that of Billingsley personally. It is quite true that the transaction involved the execution of the personal note of Billingsley for reasons which he explained in the nogotiations; but this was not all of the contract. The proceeds of the loan were for a specific use in behalf of the Guthrie Bank, and so recited in the contract. The Kansas City Bank had notice covering the terms of the contract, and it was expressly recited that the special deposit should be created from the proceeds, to be applied and used in the payment of the notes upon maturity, and these features of the contract are just as much a part of it as the notes executed by Billingsley.

(c) The claim that the Guthrie Bank had some other $30,000 which it was using to charge off the condemned bills receivable is unsupported by any fact. It had no other $30,000 than that represented by the deposit secured for it by Billingsley on the giving of his note. It is a mere play upon words to assert to the contrary. Where in this game of "Battledore and Shuttlecock" does it come in that Billingsley borrowed the amount of the notes, and that he or the bank had the same amounts of the bank's money to place in the special account in the Kansas City Bank?

(d) Much space has been given in the brief to the proposition that the Guthrie Bank was without power to become surety for the debts of Billingsley, and as such surety pledging of the funds of the Guthrie Bank as security for his debts. It need not be discussed as to whether a national bank may become surety upon the obligation of a third party; that question is not in the case. The proposition has been stated in the brief in the inverse order in which it appears. THAYER, Judge, in commenting upon the facts in the case of *Hanover*

National Bank v. *First National Bank,* 109 Fed., 421, uses the following language:

> And if the jury had found in accordance with the contention of the plaintiff bank, that the loan was made to the Kansas Bank and not to Sheldon, then so far as the plaintiff bank was concerned, the Kansas Bank was the principal debtor, and Sheldon who had executed his note for the loan was merely a surety for its re-payment.

The facts in this case bring it within the law as declared in the *Hanover National Bank* case. How can it be in an action to recover the proceeds of the note that it can be asserted that the giving of the note from which such proceeds arise was the obligation of Billingsley, and that when such proceeds were placed in such special account to be applied to the payment of the note, that the bank had thereby become surety for Billingsley? Where is the line to be drawn between this note and the money which the plaintiff is seeking to recover? How, therefore, can it be possible that a severance of the Billingsley transaction can be made and such a result worked out?

(e) The claim of plaintiff in error that the board of directors of the Guthrie Bank must have authorized the loan and that there were sufficient facts to put the Kansas City Bank upon inquiry, in the light of authorities already cited, is an idle suggestion. Boards of directors may act with respect to the management of corporations just as the business of the Guthrie Bank was done and transacted. They may by direct authority or by a course of business clothe an officer with the power which Billingsley undertook to and did exercise. As frequently pointed out, such a requirement would impose upon persons dealing with corporations the duty to inquire as to what authority the board of directors had *spread upon their minutes* as to each particular transac-

tion, and it would enable corporations who had by a long course of business held out their officers and agents as authorized to transact the business of the corporation to repudiate the acts of such officers because of *their own failure to take specific action.* The proposition as suggested in the brief of plaintiff in error has no standing in the courts anywhere.

(f) Confusion seems to have arisen in the minds of our opponents as to what is meant by the words "charged off" or "taken from the assets of the bank." They have seized, not upon the finding as made by the court, but on the language above a column in the discount register containing the words *"when paid"* and the language of the Billingsley letter to the Bank Examiner *"had paid"* to evidence the fact that these notes were paid off rather than charged out and taken from the assets of the bank. There is no pretense that they were in fact paid, but they were taken from the bills receivable of the bank in response to Government directions. "Charged off" in no sense means *paid.* When the notes are taken out of the active assets and bills receivable of a bank, they are simply removed from the securities or assets which the bank may hold under the law to meet its liabilities. The notes remain the property of the bank and belong to its stockholders. They may be collected by the bank or compromised, and in the usual course of business in banks, such collections necessarily and properly find their way into the bank as profits which are subject to division among the stockholders, or for such disposition as they may see fit to make of them. The act of "charging off" these assets did not transfer them to Billingsley. If he purchased them, he could not do so by leaving a special deposit charged with the payment of his note from which he obtained the money for such purchase. There is no pretense of such purchase. It is an idle, baseless and groundless assumption that a transac-

tion occurred between the Guthrie Bank and Billingsley regarding this charged off paper by which *he became its owner*. It would be refreshing here if light could be thrown upon the subsequent transaction regarding what became of these charged off notes, but the plaintiffs in the court below did not see fit to do so, and having failed to show, or attempt to show, such transaction so that the facts might have been found, what must become of the contention now based upon a mere play upon personal pronouns and formal printed headings in the face of the distinct and definitely found facts? The case as presented by plaintiff in error has necessitated our pointing out the radical and incessant departure from the real and true issues, but we do not believe it further requires our submitting counter-authorities or an examination of the cases cited upon questions which are not properly before this court.

The main proposition of the plaintiff in error seems to be that the Billingsley notes stand alone and constitute his individual transactions. It is not seriously contended but that such notes were accompanied by the letters and are each referred to and explained by the correspondence. It is sought, however, to segregate and separate the execution and delivery of the notes and the making of the contracts stated in the letters. The entire contracts, however, must be gathered from the letters as well as the notes. It is settled upon authority, and is quite elementary, that the contract is made up of all of the several instruments and correspondence which were made and written contemporaneously. The rule long in existence and well settled upon authority is stated as follows in 2 Parsons on Contracts, 6th Ed., page 502:

> The contract may be contained in several instruments, which, if made at the same time, between the same parties, and in relation to the same subject, will be held to constitute but one contract,

> and the court will read them in such order of time and priority as will carry into effect the intention of the parties, as the same may be gathered from all the instruments taken together. And the recitals in each may be explained or corrected by a reference to any other, in the same way as if they were only several parts of one instrument.

See also, 1 Daniel on Negotiable Instruments, Sec. 156; *Missouri Pacific Railway Company* v. *Atkinson*, 17 Mo. App., 485; *Brownlee* v. *Arnold*, 60 Mo., 79.

CONCLUSION.

The opinion of the Circuit Court of Appeals is assailed and criticised in the brief of plaintiff in error, but always, as will be seen, from a false position as to the facts in the case. Our opponents have not treated the transactions and contract as entire, but have presented the whole case as if it were based upon a few parts of the transactions, upon which a theory has been deduced that would result in a reversal of what is actually the agreement of the parties. The cause of action is devoid of merit. Billingsley was insolvent, and the correspondence and contracts show that he did not try to borrow $30,000 and $25,000 upon *his* notes without security. He was acting for his bank and the loans were safeguarded by a source of payment in the special deposit. How, then, can it be said that the Kansas City Bank shall be held liable when it was not asked to assume, and did not agree to, such liability.

Respectfully submitted.

JOHN A. EATON,
Attorney for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

CHARLES T. CHERRY, Receiver of the Capitol National Bank of Guthrie, Oklahoma Territory,
Plaintiff in Error,

vs.

CITY NATIONAL BANK, OF KANSAS CITY, MISSOURI,
Defendant in Error.

REPLY BRIEF OF PLAINTIFF IN ERROR.

Counsel for defendant in error has filed a brief which is able, adroit and ingenious.

In our brief ~~of reply~~ we sought to confine the argument to an analysis of what we conceive to be the exact point at issue. On page four we said: "The real controversy is whether or not the loans evidenced by Billingsley's note were his individual obligations or bank transactions" and we there argued that the note evidenced Billingley's individual obligation for four reasons:

1.

Because it was executed in his individual name.

2.

Its proceeds were placed to his individual credit on the books of the Kansas City Bank.

3.

These proceeds were checked out by his individual check.

4.

These proceeds were used to pay the three notes owned by the Guthrie Bank executed by the M. K. & O. R. R. Co., the Wild West Show Co., and the Western Horse Show Co., two of which Bilingsley had executed as an officer of those corporations.

The aim of the brief of the plaintiff in error is, we think, to draw the attention of the court from these salient facts and to iterate and reiterate the idea that the Guthrie Bank got the money, ignoring the distinction between getting the money and receiving the benefits of the loan pointed out on pages 10 and 11 of our brief.

This is the idea which the defendant in error continually pushes into the foreground. It confused the lower courts, it remains to be seen whether it will also confuse this court.

In pushing this idea, defendant in error devotes pages 40-49 of his brief to a reply to an argument which he fancies we made to the effect that the Guthrie Bank did not have power to borrow money, and he criticises the case of the Western National Bank vs. Armstorng. We have made no such contention, and the Western National Ban vs. Armstrong is not cited in our brief.

On page 55 defendant in error says: "The plaintiff in error has made the broad assertion that the doctrine of estoppel is not involved in this case." Our brief contains no such assertion. On page 58 he says: "The case of Sparks vs. Despatch Transportation Co., 194 Mo., 531, is cited and quoted upon the proposition that it is incompetent to show that the promissory notes of Billingsley were other than his individual obligations." This is also imaginary, as our brief does not make this claim, nor does it cite this decision.

On page 21 of his brief defendant in error states five propositions upon which he apparently relies and we wish now to examine these seriatim.

FIRST.

"The giving of the second note in renewal of the first and payment of the difference of $5,000 closed the first transaction, and the charging of the renewal note to the special account closed the second transaction. And the contracts with respect to the original loan and its renewal were fully performed and executed in accordance with their terms."

Suppose we assume that this is true. Is this the kind of contract which, when executed, becomes binding because it is executed when it would not otherwise be binding? Of course, counsel in asserting this proposition admits that the contract if executory, could not be enforced.

What are contracts which the courts will not reopen because they have been executed? Certainly they are not contracts which are otherwise fair and valid, because, if so, it would be unnecessary to rely upon their complete performance as a defense to an action to set them aside. They are contracts invalid of themselves, but which neither party will be heard to question after they are executed because he is *in pari delicto.*

In other words, they are contracts which cannot be enforced for the same reasons that, having been executed, they will not be disturbed. The law will leave the parties where it finds them.

To assert as a general proposition that the court will not open executed agreements, is to state an exception for the rule.

It is invariably true that where a party to a contract has been induced to execute and perform it by fraud, that he can set it aside.

It is invariably true that where an officer of a corporation has wrongfully used the funds of the corporation that the corporation can recover them from any person who has full knowledge of the officer's fraud.

It is not necessary to further argue so plain a proposition; and, without citing authorities in support of the general rule, it is sufficient to call attention to the cases cited in our brief (where executed contracts have been avoided).

Particularly is this true in Chrystie vs. Foster, 61 Fed. 551; Lamson vs. Beard, 94 Fed. 30, and Rankin vs. Chase National Bank, 188 U. S. 557, which involved facts almost identical with the case at bar.

While on this point, however, we cannot forbear quoting from Section 535, Alderson on Receivers, cited by defendant in error:

"But as the representative of the creditors of an insolvent corporations, he (the receiver) may obejct that a judgment against the corporation by confession was not obtained in such a manner as to be binding upon it, and may have such judgment set aside on motion; and he may sustain an action to vacate and set aside a judgment on the ground that it was obtained without consideration, by collusion with the officers of the corporation, and in fraud of creditors."

SECOND.

The next position taken by the defendant in error on, page 21 of his brief, is as follows:

"SECOND:—The notes and special deposits were bank transactions. The notes were the obligations of the Guthrie Bank, and the deposits in the Kansas City Bank were used by the Guthrie Bank for the purpose named in the contract."

Upon reading this general proposition we expected to find in support of it an argument squarely meeting the issue which we have raised, namely: Whether the loans evidenced by Billingsley's notes were his individual obligations or bank transactions, but in turning to the discussion on pages 25-55 of the brief of defendant in error, we find a great deal sail about the power of the Guthrie Bank to borrow money, and a great deal more quoted from the decisions of various courts, but almost nothing on the exact point at issue.

The point involved under this heading is essentially a question of fact, and what courts have decided upon other facts and what they have said in opinions based upon other facts cannot determine the facts in this case.

That the notes were Billingsley's obligations, and not the obligations of the Guthrie Bank; that Bilingsley and not the Guthrie Bank appropriated the proceeds of these notes are positions which we have fully covered in our original brief, particularly on pages 4 to 11, and 28 to 30, but in this connection and in further proof of the fact that Billingsley's note was not only his individual obligation, but so regarded by all the parties, we quote the following letter from the Kansas City Bank relative to the promissory note:

"City National Bank, Kansas City, Mo.,
"Nov. 9, 1903.

"Chas. E. Bilingsley, Esq., Guthrie, O. T.

"Dear Charley:: Your letter of the 7th received and you say that your note for $30,000 will be due Monday; well old man we have taken you at your word; we have charged your account with note, and return same herein, fur the reason Charley we can find no collateral. Mr. Jurgen is out of town, and we of course will be glad to renew it for you on satisfactory collateral, and I enclse blank collateral note herein for that purpose. If the collateral was returned to you, let me know. I was out of town when this loan was made, and you can bet your boots old man we are going too treat you right.

"With kind personal regards, I remain,

"Very truly yours,
"J. G. STREAN, Cashier."

In this proposition, however, there is one statement of fact with which we take issue, namely: "and the deposits in the Kansas City Bank were issued by the Guthrie Bank for the purpose named in the contract."

Let us examine this for a moment. What was the purpose named in the contract? To reduce excessive loans. What was the money used for? It was used by Billingsley to pay $30,000 of his bank's bills receivable, and on this point we refer the court to pages 7 and 8, 10 and 11 of our original brief.

In fact, the loans which were paid were not excessive loans, as we have shown on page 11 of our original brief.

Defendant in error in the thirty pages of his brief set apart to this proposition, quotes from many authorities. It is, of course, impossible to refer to all of them without unduly pro-

longing this reply, and indeed it would be unprofitable to do so. Those, however, upon which he apparently relies most strongly are Hanover National Bank vs. First National Bank; Auten vs. United States National Bank, and Aldrich vs. Chemical National Bank; all of which are easily distinguishable as appears from the following analysis:

Hanover National Bank vs. First National Bank, 109 Federal 421, 48 C. C. 482.

The diference between it and the case at bar is simply this: There the court held that if the note signed by Sheldon was for the benefit of the Kansas bank and if the Kansas bank received, kept and appropriated the proceeds of the note, then the New York bank could recover.

The same case, under the title "First National Bank vs. Hanover National Bank," was previously tried, decided and reported in 66 Fed. 34, 13 C. C. A. 313, and by reference to that opinion it will be seen that the court then held that notwithstanding the fact that the proceeds of the note were placed to the credit of the Kansas bank, if Sheldon did actually appropriate the proceeds for his personal use that the Kansas bank was not liable on the note. This case, as reported in these two places, shows very clearly that the position which we have taken is correct, namely, that unless the Guthrie bank received, retained and appropriated for its own use the proceeds of the Billingsley loan it is not liable thereon, and the whole question is, as we have frequently stated, one of fact, namely: Did the Guthrie bank receive, retain and appropriate the proceeds of the notes?

Auten vs. U. S. National Bank, 174 U. S. 125, 19 Sup. Ct. Rept. 628.

In this case Allis, as president of the Little Rock bank, pursuant to a general custom of the bank and of all the banks in Little Rock and in conformity with a well established course of dealing between his bank and the New York bank, discounted a number of notes with the New York bank, one of which was payable to his

own order, by him endorsed individually, and also as president of his bank. The proceeds of this note, together with the proceeds of others which he discounted, were placed to the credit of the Little Rock bank and the cashier of that bank was advised of the credit and notice was given to him of the transaction. It was conceded that the cashier was authorized to make such discounts for the Little Rock bank and the court held that under these facts Allis was acting within the apparent scope of his authority and that the contract was binding upon the Little Rock bank, notwithstanding the subsequent disposition of the money.

It will be observed that in the Auten case the note was not made by Allis himself, while in the case at bar the note was made by Billingsley personally.

In the Auten case the note was endorsed by the payee, Allis, and also by the bank, which the court said was the usual and customary way in which the paper would have come into the possession of the bank as its property.

In the case at bar the notes neither bear the signature nor endorsement of the bank in any way, and had never been in its possession.

In the Auten case the proceeds of the discounts were placed directly to the credit of the Little Rock bank, while in the case at bar the proceeds were placed to the personal credit of Billingsley.

In the Auten case the cashier of the bank, who confessedly had authority to make this particular discount, was immediately notified thereof and all subsequent correspondence was with him, while in the case at bar no one had authority to make such a contract and no member of the Board of Directors ever had any knowledge of it.

In the Auten case the Board of Directors knew that paper was being discounted as a regular part of the bank's business, while in the case at bar the Board of Directors never heard of this transaction nor of any one similar to it.

In the Auten case the contract was fair upon its face and one conducted in the usual course of business. In the case at bar the contract was void upon its face, without precedent in the transactions of the bank, and without parallel in the course of fair and legitimate banking.

Aldrich vs. Chemical National Bank, 176 U. S. 618, 20 Sup. Ct. Rep. 498, is the same case reported under the title Armstrong vs. Chemical National Bank, 83 Fed. 556, 27 C. C. A. 601, and under the name of Chemical National Bank vs. Armstrong, 65 Fed. 573, 13 C. C. A. 47.

The following quotation from page 505 of the Supreme Court Reporter at once distinguishes the case under consideration from the case at bar:

"Without further citation of cases we adjudge, both upon principle and authority, that as the money of the Chemical Bank was obtained under a loan negotiated by the vice president of the Fidelity bank, who assumed to represent it in the transaction, and as the Fidelity bank used the money so obtained in its banking business and for its own benefit, the latter bank, having enjoyed the fruits of the transaction, cannot avoid accountability to the New York bank, even if it were true, as contended, that the Fidelity bank could not consistently with the law of its creation, have itself borrowed the money."

And the following is quoted from page 506 of the Supreme Court Reporter as further showing the exact ground upon which the case was rested:

"We do not rest our conclusion in the present case upon any question as to diligence or want of diligence upon the part of the directors. We rest it upon the fact, and the implied obligation arising therefrom, that the Fidelity bank used in its business and for its benefit the money which the Chemical bank placed to its credit in consequence of a loan negotiated by Harper, who assumed to represent it."

It is of course at once apparent that the decision in the Chemical National Bank case is based upon the existence of the very facts which we deny in the case at bar.

THIRD.

"THIRD:—The Guthrie Bank recognized and ratified the transactions and contracts of its president, Billingsley, with the Kansas City Bank as its acts, and as made for its use and beenfit."

As a matter of law, the contract, as we show on pages 20 to 25 of our original brief, is not susceptible of ratification, because it is *ultra vires*.

Let us, however, examine the facts which defendant in error assigns as the basis of this claim.

There are nine of them set out on pages 12 and 13 of defendant's brief.

"(a) It took the $30,000 and placed it in the personal account of its president, where it kept its borrowed money. (Finding No. 7.)."

We trust the court will read this finding and will bear in mind that the $30,000 borrowed by, and placed to the credit of, Billingsley, was conveyed to the Guthrie Bank by means of Billingsley's personal check upon the Kansas City Bank; and that the Guthrie Bank surrendered for this check $30,000 of its bills receivable.

"(b) It forthwith used the proceeds to charge out from its assets notes aggregating $30,000 which had been previously objected to by the Comptroller of the Currency through the bank examiner. (Finding No. 7)."

This carries forward the same confusion of thought to which we alluded in the opening of this reply brief, and we again remind the court that the Guthrie Bank did not get the proceeds of this loan, but took Billingsley's personal check, so that while it received the money it did not receive the benefit of the loan. (Pages 10 and 11 of our original brief.)

It did not use this money to charge out these notes, but this money was taken and used by the Guthrie Bank for absolute payment of these notes. (Original brief, pages 7, 8, 10, 26.)

A bank never charges off solvent paper. When paper is charged off it is not marked paid and the bank examiner is not

advised that it has been paid, and the paper is not taken from the possession and assets of the bank, but remains absolutely in the possession of the bank as its property. If these notes had been charged off they would have remained assets of the bank and would have come into the hands of the receiver, but the trial court specially finds, "they were taken out of the assets and from the possession of the Guthrie Bank, and are not now in said assets, and it does not appear what has become of them." (Printed Record, page 51.)

So much is said, here and elsewhere, in the brief of defendant in error, about these notes being "charged off" that we wish here and now to settle that question definitely by the record. We assert that these notes were paid and were not "charged off." The distinction is vital.

Not only does defendant in error iterate and reiterate this idea, but the Circuit Court of Appeals fell into the same error and referred to these notes as having been "charged off."

The error doubtless arises from an error in the original finding, numbered 8.

The last two paragraphs of this finding as originally filed were as follows: (18)

"These three promissory notes, Nos. 8762, 8763, and 9991, were taken out of the assets and from the possesion of the Guthrie bank, and are not now in said assets, and it does not appear what has become of them."

"The Guthrie Bank made the credit ticket charging off the above notes on September 8th, 1903. These notes are the ones hereinbefore referred to as having been objected to by the Bank Examiner on his examination made on the 1st day of September, 1903."

Thereafter we filed a motion to correct this finding on account of this particular error. (Pages 45 to 47.)

"Now comes the plaintiff and moves the court to correct and supplement the Findings of Fact made by the court and filed herein, in the following respects:

1. In Finding 8th it is recited: 'The Guthrie Bank made the credit ticket charging off the above notes on September 8

1903.' No other reference is made in the findings to the date of that transaction other than in the recital just quoted. The entire transaction is in writing and the books of the Capitol National Bank show conclusively that the entries relative to this transaction were not had or made in those books until September 9, 1903, and neither the credit ticket referred to, nor the entries on the books of the Capitol National Bank show the three $10,000 notes to have been "charged off." The book entries show those notes were paid. In the printed record, pages 65 to 68, appears the following:

'By Mr. Scarritt: Q. I hand you Exhibit 22 and ask you to tell the court what that is? A. That is a copy of the Discount Register for the year 1903 of the Capitol National Bank.'

Said paper marked Exhibit "22" is in the words and figures following, to-wit:

Exhibit "22."

August 8, 1903.

	Item.	Date of Time.	Date Disc'td.	Face.	When Paid
8762	Mo. Kans. & Okla. Co., C. E. B. V. P. 6-8-03	60	6-8-03	10000	9-9-03
8763	Wild West Show Co., C. E. B., Treas. 6-8-03	60	6-8-03	10000	9-903

October 29, 1903.

9991	Western Horse Co. ..7-29-03	..	7-29-03	10000	9-9-03

Q. Will you state to the court, if you please, Mr. Selsor, what those items which I have read—what the transaction indicated by the three items I have read, was? In other words what do they mean?

A. These are notes each one payable to the Capitol National Bank; discounted by the bank; and show they were discounted by the bank; and show they were discounted on the days indicated; and the three of them were paid on the 9th of September, 1903.

Q. You were bookkeeper in the bank at that time, you say?

A. Yes, sir.

Q. Exhibit '23.' I call your attention to that Exhibit. State to the court what it is.

A. That is a check on the Capitol National Bank, Guthrie, Oklahoma, dated Guthrie, Okla., Sept. 8th, 1903, payable to 'Bank,' for Thirty Thousand Dollars,—signed by Chas. E. Billingsley.

Q. Is that the signature of Chas. E. Billingsley?

A. Yes, sir.

Mr. Scarritt: We offer that exhibit, together with the rubber stamp across the face, in evidence.

Said paper, marked Exhibit "23," was read in evidence and is in the words and figures following, to-wit:

Guthrie, Okla., Sept. 8, 1903.

The Capitol National Bank, Pay to Bank or bearer, $30,000 Thirty Thousand no-100 Dollars.

Chas. E. Billingsley.

Stamped across the face of said check, with rubber stamp, is the following: "Capitol Nat. Bank, Paid, Sept. 9, 1903. Teller. Guthrie, O. T."

(By Mr. Scarritt:)

Q. I now hand you Exhibit "24" and ask you to tell the court what that document is.

A. That is a credit ticket crediting Bills Receivable Account with the bank with the three notes, No. 8762 for $10,000; No. 9991 for $10,000; No. 8763 for $10,000.

Q. Are those the same items referred to in the Discount Register, already in evidence?

A. I think so. This refers to the discount number.

Q. Is that Exhibit "24" one of the files from the banking house of the Capitol National Bank?

A. Yes, sir.

Q. Made in the usual course of its business?

A. Yes, sir.

Mr. Scarritt: We offer this paper in evidence.

Said paper, marked Exhibit "24" is in the words and figures following, to-wit:

'Credit B-R

No. 8762	10000
No. 9991	10000
No. 8763	10000
	30,000.00'

Sept. 8, 1903.

(By Mr. Scaritt:)

Q. You may state if you please, what connection in the conduct of the busines of that bank did that slip have with the check of Chas. E. Billingsley, marked Exhibit '23' and introduced in evidence? (Being the check set out in Finding 8.)

A. The check was given to take up those three notes.

Q. Do you mean, to pay off those three notes?

A. Yes sir—to take them out of the assets of the bank.

Q. Were the three notes described on the credit ticket marked Exhibit '24' and on your discount Register, which is in evidence, marked Exhibit '22,' the property of the Capitol National Bank prior to their payment?

A. Yes, sir, it shows on the books.

Q. After this transaction of Sept. 9, 1903, did they, to your knowledge, thereafter appear among the assets of the Capital National Bank of Guthrie, Oklahoma?

A. No sir.'

The plaintiff therefore asks the court to strike from its findings the words heretofore quoted and in lieu thereof insert the following:

'A credit ticket was made under the date of September 8th, 1903, by the Guthrie Bank upon the receipt of the check of Charles E. Billingsley, dated September 8th, 1903, for $30,000 but no entries on the books of that bank were made relative to that transaction until September 9th, 1903, when the entries under the caption "When Paid" were made on the Discount Register of that bank opposite the record of the items of discount there recorded:

		Date of Item.	Time.	Date.	Face Disc't.	When Paid.
8762	Mo. Kans. & Okla. Co., C. E. B., V. P.	6-8-03	60	6-8-03	10000	9-9-03
8763	Wild West Show Co., C. E. B., Treas.	6-8-03	60	6-8-03	10000	9-9-03
9991	Western Horse Co. ..	7-29-03	..	7-29-03	10000	9-9-03

Plaintiff states that the finding of the court herein complained of is not a full finding of the transaction purporting to be recited and is a misleading statement of one of the essential facts of this controversy.'

This motion was sustained and the 8th finding was amended to read as follows (Pages 50 and 51):

In the above entitled action the plaintiff having moved to correct and supplement the Findings of Fact heretofore entered, and the court having heard said motion on written memoranda filed by plaintiff and defendant, and being fully advised in the premises,

It is hereby ordered

1st. That the 8th finding be amended as follows: Strike out the last two paragraphs of said finding, and in lieu thereof insert the following:

"Upon receipt of the check of Charles E. Billingsley dated September 8th, 1903, above set forth, a credit ticket was made by the Guthrie bank in words and figures as follows:

Credit B-R		
No.	8762	10 000
	9991	10 000
	8763	10 000
		30 000

Sept. 8, 1903.

And entries in the column headed "When Paid" were made September 9th, 1903, on the discount register of that bank opposite the record of the items of discount there recorded, as follows:

August 8, 1903.

	Item.	Date of Time.	Date Disct'd.	Face	When Int.	Paid.
8762	Mo. Kans. & Okla. Co., C. E. B. V. P. 6-8-03	60	6-8-03	10000	9-9-03	
8763	Wild West Show Co., C. E. B. Treas. 6-8-03	6$	6-8-03	100000	9-9-03	

October 29, 1903.

9991	Western Horse Co. .....7-29-03 ..	7-29-03	10000	D9-9-03	

These promissory notes, Nos. 8762, 8763 and 9991 are the ones hereinbefore referred to as having been objected to by the Bank Examiner on his examination made on the first day of September, 1903. There were taken out of the assets and from the possession of the Guthrie bank, and are not now in said assets, and it does not appear what has become of them.'

We trust this will settle this point, as all reference to the notes being "charged off" is here positively and entirely eliminated.

Returning now to pages 12 and 13 of defendant's brief, we find his third fact on which he bases ratification as follows:

"(c) It forthwith took credit in its general account current with the Kansas City Bank for the amount of the loan. (Finding No. 7.)"

This is a reiteration of the original error; the Guthrie Bank did not take credit for the amount of the loan; the amount of the loan was placed to Billingsley's personal credit.

"(d) It recognized the creating of the special account in the Kansas City Bank, and repeatedly reconciled it upon statements from the Kansas City Bank. It received advice of the creation of such special account, and received interest upon the deposits contained therein, being the proceeds of the $30,000 note and the $25,000 note. (Finding Nos. 11, 22 and 23.)"

The court will bear in mind that the general books of the Guthrie Bank were so kept as to conceal this special account. Counsel for defendant in error recognizes, on page 20 of his brief, that the books were so kept as to deecive the bank examiner, and if they deceived the bank examiner, they, of course, would

not be noticed by the directors of the bank and, therefore, the book entries, fraudulently concealed by Billingsley, would not be noticed.

The case of Lamson vs. Beard, 94 Fed 30, 36 C. C. A., 56, 45, L. R. A. 822, is directly in point on this proposition, the court saying:

"While the transactions appeared upon the books, as stated in the findings, it is a misuse of words, and inconsitent with honest thought, to say that they were known to the bank. Possession of facts, in books purposely kept in a manner to conceal truth, is not in law or morals knowledge of the facts. Cassatt alone had knowledge of the truth, and, though he was president, his knowledge of his own frauds, perpetrated for his individual purposes, was not attributable to the bank."

"(e) In the transaction concerning the $25,600 note, it caused to be paid $5,000 on the original $30,000 indebtedness, and made a contract for a special deposit with reference to the balance of $25,000 and carried such balance in its general account current without change and without question as to the transaction being in behalf of the Guthrie Bank. (Finding Nos. 13, 14, 15, 16 and 17.)"

"(f) To pay the $5,000 difference between the $30,000 obligation and the $25,000 obligation, the cashier of the Guthrie Bank wrote a check on the account of Billingsley ,in which was kept the proceeds of loans made by the bank, for the sum of $5,000 to provide for the difference. (Findings Nos. 18 and 30.)"

The quotation from Lamson vs. Beard is also a sufficient reply to these paragraphs as the second loan is of the same class as the first and the transaction was carefully concealed so that it would not appear upon the books of the Guthrie Bank.

When the $30,000 was charged by the Kansas City Bank to the account of the Guthrie Bank, and Bilingsley was advised thereof by a letter addressed to him personally (Printed Record 21) he made absolutely no entry whatever on the books of the Guthrie Bank. If it had been a transaction of the Guthrie Bank and not his own, it is certain that some record would have been made upon its books.

When the $25,000 note was executed by Billingsley, no record whatever was made upon the books of the Guthrie Bank. There

is no credit to bills receivable, there is no charge to the Kansas City Bank, there was nothing.

Billingsley signed and delivered to the teller of the Guthrie Bank his personal check for $5,000 (Printed Record, 24) which was charged against his personal account and the general account of the Kansas City Bank was credited with a like amount. That is absolutely the only record made at the Guthrie Bank, and it will be observed that the transaction was so completely concealed that it could not have possibly been discovered by any examination. The body of Billingsley's check was in the handwriting of the cashier, but it does not appear that the cashier had any knowledge of the transaction or of Billingsley's secret negotiations and methods.

"(g) With reference to the loan in question, it transacted the business and made disposition of the proceeds in the personal account of Billingsley and created a special deposit in the Kansas City Bank in the same manner as it had previously done and in accordance with a course of business prevalent and long existing in the Guthrie Bank. (Findings Nos. 28, 30 and 31.)

As we understand the record, this is simply a misconstruction of the facts. There is no record of any similar transaction. The 28th finding (Printed Record, pages 28, 29, 30) sets up a detailed statement of money borrowed by the Guthrie Bank, and the court will observe that there is no parallel case to this. This was absolutely the only loan ever evidenced by a note signed by Billingsley personally, and no other loan was ever subjected by the lending bank to Billingsley's personal check.

The 31st finding at page 31 of the record shows that the transaction there set out was a loan direct to the Guthrie Bank evidenced by its certificate of deposit and secured by its bills receivable.

"(h) The Guthrie Bank paid interest upon the $25,000 note in a direct transaction with the Kansas City Bank. (Finding No. 32.)"

This finding is somewhat confusing; the letters quoted indicate that Billingsley himself had paid the interest, while the

conclusion of the trial court was that the bank paid it.

"(i) Every act and step in the business done and taken by the Guthrie Bank was in acquiesence and ratification of the contracts as bank transactions, and there was no act or objection against the contracts or transactions as bank obligations by any of its officers or directors, or anyone in its behalf."

This is a mere conclusion of law, and while it is true that the record does not show any objection by the directors, it is equally true that the record does not show any knowledge by the directors, nor any book entries from which the court would reasonably charge them with knowledge.

It is undoubtedly the law, as shown in our original brief, that where a person deals with an officer of a bank who is acting both individually and as such officer, it is incumbent upon such person when such transaction is questioned to prove such officer's authority, and in order for the Kansas City Bank to retain this deposit as a proper fund with which to pay Billingsley's personal note, it was its duty to prove Billingsley's authority to act in the matter, or that the bank appropriaed or used the money.

FOURTH.

The fourth and fifth propositions stated on page 21 of the brief of defendant in error are not separately treated elsewhere and we have already fully discussed them in our original brief. We therefore do not think it is necessary to add anything further here.

FIFTH.

In additon to the general propositions stated on page 21 by defendant in error, there are some other points suggested to which we wish to briefly allude.

(a) The defendant in error seems to attach considerable importance to the fact that when Billingsley checked this $30,000.00 out of the Kansas City Bank, it was placed to his personal credit on the books of the Guthrie bank.

We do not see how this can help defendant in error. What else should have been done with Billingsley's individual credits?

The fact that some of the bank's money was mingled with this account does not make it any less natural for Billingsley's individual money to have been credited there.

(b) The point is made that the Receiver seeks to retain the fruits of the contract while repudiating its obligations.

What fruits of the contract, permit us to inquire, are we seeking to retain? What connection with the contract did we have? Our president undertook, without authority, to pledge our funds to the payment of his individual debt. All we seek to do is to recover our funds. We received no fruits of the contract. We were not a party to the contract except as Billingsley, without authority, sought to make us a party.

The money we seek to retain is what we received in payment of the three $10,000.00 notes and we knew nothing of the secret dealings between Billingsley and the Kansas City Bank.

(c) As it cannot be denied that Billingsley's note was credited to his personal account on the books of the Kansas City bank and that his personal check against this fund was paid, counsel seek to avoid the evident force of this by saying that it was a mistake. We do not so understand the record, the mistake simply being that the check was credited to the general account of the Guthrie Bank instead of to a special account. It was not a mistake to credit the note of Billingsley and to honor his personal check, because the entire correspondence shows that this was the agreement of the parties. The only mistake therefore made during Strean's absence was in not creating the special account, and this is the mistake he corrected upon his return. (Findings 10 and 11; page 18 to 20.)

Whatever the book entries made by the Kansas City Bank may have been, and whether they were made designedly or not, the facts remain and they cannot be explained away: (1) that the note was signed by Billingsley personally; (2) that the proceeds

of this personal note were credited to his personal account on the books of the Kansas City bank; (3) that his personal check against this personal account was honored; and (4) that this personal check was used by him in paying $30,000.00 worth of bills receivable of the Guthrie Bank, executed by corporations in which he was interested.

The personal note and the personal check were alarm bells loudly warning the Kansas City Bank that Billingsley was dealing personaly in this matter and that it must take the next step at its peril.

(d) Counsel refers to this account No. 2 as a special deposit. This is an error. It is elemental law that a special deposit means one received by the bailee to be kept and returned to the bailor. The identical thing is to be returned. 7 Words & Phrases, page 6574.

(e) The following is quoted from the brief of defendant in error:

"First, the Guthrie Bank recognized and acted upon the part of the contract contained in the letter by which the special account or special deposit was entered and made, and it required such contract to impress the proceeds or amount of money named in the Billingsley notes so as to bring into existence such special deposits. Second, that the Kansas City Bank, after it had created the special deposit and set apart upon its books the specific amounts as security for the payment of the Billingsley notes, could not depart from the agreement in that respect, and it was thereafter obligated to do just what it did do, viz: Apply the amounts contained in the special deposit towards the satisfaction of the notes and its right to do so arose and became obligatory upon it by virtue of the contracts."

This reminds us of the discussion between the minister and the sinner relative to the meaning of the Parable of the Good Samaritan. The minister said it meant that any person was his neighbor to whom he could render a service. The sinner, however, claimed that the meaning was that any person was his neighbor who would render him a service.

(f) On page 51 of the brief, defendant in error, in criticising the case of Anderson vs. Kissam cited by us, refers to the fact

that it was reversed (Kissam vs. Anderson, 145 U. S.) in such a way as to indicate that the quotation made by us was affected by this reversal. The fact is that the supreme court reversed it upon other points and did not in any way interfere with the correctness of the principle contained in the portion quoted by us.

CONCLUSION.

In conclusion we wish to quote the following from pages 24 and 25 of our original brief:

"An approach to the point involved in this case from an entirely different angle will aid in a complete view. If we assume that Billingsley had paid these notes to the Kansas City Bank, either by compulsion or voluntarily, and that this suit was brought by him against the Guthrie Bank to recover on the notes, we have a statement of the case which realy simplifies the point involved.

"Billingsley would have the same right to maintain such an action that the Kansas City Bank has to maintain its defense, and the mere suggesting of the issue as between Billingsley and the Guthrie Bank is sufficient to convince the mind that Billingsley could not recover. The Kansas City Bank cannot claim a greater right than Billingsley would have, because it dealt with Billingsley knowing him to be acting both for himself and as agent for his bank and therefore was bound by the actual and not by the apparent transaction."

Respectfully,

D. T. FLYNN,
W. C. SCARRITT,
C. B. AMES.

RANKIN, RECEIVER OF THE CAPITOL NATIONAL BANK OF GUTHRIE, OKLAHOMA, v. CITY NATIONAL BANK OF KANSAS CITY, MISSOURI.[1]

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 51. Argued November 12, 13, 1907.—Decided February 24, 1908.

In a transaction between two banks the president of one gave his personal note to the other, accompanied by an agreement of his bank, signed by himself as president, that the proceeds of the note should be placed to the credit of his bank by, and remain with, the discounting bank until the note was paid; while there were certain transfers of checks between him and his own bank the record did not show that the maker of the note personally received the proceeds thereof, and no contention was made that the agreement was illegal. *Held*, that:

Under the circumstances of this case, the discounting bank was entitled to hold the proceeds of the note, as represented by the credit given on its books therefor, as collateral security for the payment of the note and to charge the note against such credit, and relieve itself from further responsibility therefor.

The receiver of a bank stands in no better position than the bank stood as a going concern.

144 Fed. Rep. 587, affirmed.

THE facts are stated in the opinion.

Mr. C. B. Ames, with whom *Mr. D. T. Flynn* and *Mr. W. C. Scarritt* were on the brief, for plaintiff in error.

Mr. John A. Eaton for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This suit was brought by the receiver of the Capitol National Bank of Guthrie, Oklahoma Territory, which we shall call the Guthrie Bank, to recover the amount of an alleged deposit in the City National Bank of Kansas City, Missouri,

[1] Originally docketed as *Cherry, Receiver*, v. *City National Bank*; by order of the court *George C. Rankin*, successor of the former receiver, was substituted as plaintiff in error.

which we shall call the City Bank. At a trial without a jury in the Circuit Court the facts were found and judgment was given for the defendant, which judgment was affirmed by the Circuit Court of Appeals. *Cherry, Receiver,* v. *City National Bank,* 144 Fed. Rep. 587; *S. C.,* 75 C. C. A. 343. We give an abridgment of the findings of the Circuit Court.

The bank examiner had complained of excessive loans by the Guthrie Bank and especially of three notes for ten thousand dollars each, made, respectively, by the Missouri, Kansas and Oklahoma Company, the Wild West Show Company, and the Western Horse Show Company, and had directed them to be reduced. Thereupon one Billingsley, its president, who managed its business with the defendant, wrote to the defendant's cashier, saying "I want you to take my note of 30,000.00 and Cr. my Bank with like amount in a special account with the understanding that said account is not to be checked against. My reason for wanting this is that I have that amount of excessive loans that the Department is kicking about. . . . You will not be out any money and loan and deposit will offset each other on your books." The Guthrie Bank had a general deposit with the City Bank, but this on its face was a scheme for a separate paper transaction. The proposal was accepted, Billingsley sent his note, and wrote saying that he had given the Guthrie Bank his check on the City Bank for the amount, adding: "and it is agreed that said [Guthrie Bank] is to keep this 30 Th with you until note is retired together with as large a balance as possible. . . . Chas. E. Billingsley, Pres't."

Billingsley gave the above-mentioned check to the Guthrie Bank, which credited it to his personal account, in which the bank's money was kept, as will be stated later. The same day he gave to the bank a check against his personal account for the same sum, which was charged to that account and credited to bills receivable, and thereupon the three notes objected to by the bank examiner were taken out of the bank's assets and possession. What became of them does not appear. It was argued from several circumstances not necessary to mention

that they were paid by Billingsley, but that fact is not found. Billingsley does not seem to have been personally liable upon them, and all that can be said is that the scheme to get them off the books was carried out. The cashier of the City Bank was away when the letter with Billingsley's note arrived, and there were telegrams; after which the City Bank on September 10 or 11, 1903, charged the note to bills receivable, the check to Billingsley, and credited the Guthrie Bank with $30,000 on general account. On September 14, the cashier, having returned, transferred $30,000 to a special account according to the plan. Billingsley was notified and all transactions in this matter thereafter were entered by the City Bank on this special account.

On November 9, 1903, Billingsley's note falling due, the account was charged with the amount and interest. The same day a letter from Billingsley was received asking an extension. The cashier replied that they had charged his account with the note, but would renew it on satisfactory collateral, and returned the note. Billingsley answered, enclosing a note for $30,000, and requesting that the former arrangement be continued. In answer to this the president of the City Bank wrote that they preferred a demand note, and that to satisfy the comptroller they would rather that it should be for $25,000 instead of $30,000. On November 30, 1903, Billingsley enclosed his note for $25,000 in a letter to the president, requesting that the proceeds be placed as a special deposit to the credit of the bank, and repeating the old agreement: "It being expressly understood and agreed that this fund is not subject to check but is to remain with the City National Bank for the payment of the note, and you are hereby authorized to charge this note to said account at any time you desire." Originally the note was signed "Chas. E. Billingsley Pt." and the letter with his name without addition. On December 12, the president of the City Bank wrote that the note should be signed individually and the letter as president, and enclosed the letter for the change. Billingsley admitted the mistake, added "Prest." to

his signature and returned the letter, at the same time authorizing the City Bank to strike off the "Pt." from the signature on the note, which was done.

On November 30, 1903, in order to make the balance of the City Bank account on the books of the Guthrie Bank correspond with the books of the City Bank, Billingsley gave the teller of the Guthrie Bank his check upon it in favor of the City Bank for $5,000, which was stamped paid, and the amount credited to the City Bank on the books of the Guthrie Bank. On December 7, the City Bank credited the Guthrie Bank with $25,000 on the special account. It credited two per cent interest at the end of each month while the account was open, and there was a small deduction as the result of the first stage for interest on the $30,000 note, so that on April 4, 1904, the special credit to the Guthrie Bank was $24,994.54. On that day the City Bank, having no knowledge that the Guthrie Bank was in a failing condition, charged the note to the account, returned the same duly cancelled, and closed the account. Later on the same day the Guthrie Bank failed and went into the hands of a receiver. The receiver notified the City Bank that the note was not a liability of the Guthrie Bank and that the City Bank would be held.

There are few other facts needing mention. Statements of account were made monthly by the banks to each other up to February 1, 1904, and after that daily reconcilements were made. The statements of the City Bank showed the special or No. 2 account as well as the general one, and these were entered in the Guthrie Bank reconcilement book as No. 1 and No. 2. The Guthrie Bank also recognized the existence of the special account in corrections sent to the City Bank. But the whole amount appeared in its general account. It should be added that the Guthrie Bank was in the habit of borrowing money by issuing notes and crediting the proceeds to Billingsley's personal account, the notes being paid by Billingsley's checks. Billingsley also entered his personal deposits and drew his personal checks upon the same account. It should be added

further that in the Circuit Court both counsel agreed that it was not contended that the contract was illegal because it enabled a false showing to be made of the condition of the Guthrie Bank.

The plaintiff, the receiver of the Guthrie Bank, argues that the foregoing transaction was really a loan to Billingsley with an attempted pledge of a deposit of the Guthrie Bank in the City Bank, and is shown to have been so by the facts that he gave his personal note, that he gave his check on the City Bank for the amount to the Guthrie Bank, and that by means of another corresponding check the three notes objected to by the bank examiner were taken out of its assets and possession. It is added that Billingsley was interested in two at least of these notes, as he was vice president of the companies that made them, and that the entries on the books and other facts show that they were paid. But, as we have said, neither legal interest on Billingley's part nor payment is found, and we cannot find those facts here. *Generes* v. *Campbell*, 11 Wall. 193. Leaving them on one side, the argument for the plaintiff stands mainly on the technicality that Billingsley, instead of merely writing the letter in which the agreement was embodied, and having the credit on special account issued without more to the Guthrie Bank, gave his check on the City Bank as the means of getting the credit on to the Guthrie Bank's books. We will deal with these arguments in our own order and way.

This suit it will be remembered is to recover an alleged deposit, and the first thing to notice is that the whole business, from beginning to end, was and was intended to be a mere juggle with books and paper to deceive the bank examiner. The City Bank never received anything from the Guthrie Bank, the Guthrie Bank never parted with anything to the City Bank, or with anything for the loss of which the City Bank is responsible, if it parted with anything at all. It would stretch the findings to say that the Guthrie Bank does not still own the three notes. But if it does not the City Bank had nothing to do with its giving them up. The supposed surrender was not a consideration to the City Bank, and so far as appears

never was known by it to have taken place. It was a transaction wholly between Billingsley and his own bank. So far as the surrender of the notes goes, the parties stand exactly as if that had taken place without a check, in consideration of Billingsley making the note on which the credit was given to the Guthrie Bank. It is said that the Guthrie Bank got the money, but did not get the benefit of the loan. As between the banks no one got any money, and the only benefit of the loan in fact or contemplation was a swindle upon the bank examiner. If the City Bank should be held it would be held without ever having received a *quid pro quo* except in the most narrowly technical sense. The consideration would be the delivery of Billingsley's note by the Guthrie Bank.

Again, the alleged deposit was a parol contract made by the letters of which we have given extracts. There is no other contract but the one so made. But by those letters the City Bank did not promise to hold $30,000, or at the later stage $25,000, to the credit of the Guthrie Bank out and out. On the contrary, it merely agreed to credit these sums against the notes which it held, on the express condition that no checks should be drawn against them, and that when the first note matured, or, after the second, whenever the bank pleased, the notes should be charged against the account and extinguish it. We perceive no sufficient ground for substituting a fiction for the only promise the City Bank ever really made. If the Guthrie Bank had sued while it was a going concern it could not have recovered, and the receiver stands no better than the bank.

This promise, however, the City Bank made to the Guthrie Bank at the first step of the transaction, and not to Billingsley. The plan was proposed as a plan for the help of the Guthrie Bank. It provided from the start for a credit to the Guthrie Bank. At the moment when the agreement was reached and Billingsley sent his note he signed a promise as president, embodying the terms. He corrected the letter with his second note to an official promise in like form. This meant a promise

by the Guthrie Bank, and shows that the Guthrie Bank, not Billingsley, was the other partly to the bargain. It is true that Billingsley's personal obligation was given to the City Bank, but the only reasonable interpretation is that he lent his credit to the bank of which he was the leading spirit, to help it to perpetrate its fraud. It seems to us too plain for further argument that the contract concerning the credit was made between the banks at the beginning and governs all that happened later.

The only material thing that happened was Billingsley's drawing his check on the City Bank for the amount of the loan and depositing it to his credit in his own Guthrie Bank. Even if this, as in other cases, was regarded as a deposit of the bank's money, still it was not quite logically consistent with his contract that Billingsley should make his check upon the City Bank for money which it had agreed with the Guthrie Bank to credit to it. But the check was only a documentary form to justify the entry of a deposit. To the City Bank it was immaterial, as the result no less was the credit to the Guthrie Bank upon the special account and subject to the terms to which both parties had agreed. The subsequent check on the Guthrie Bank to the Guthrie Bank was another documentary form to give a plausible justification for getting the three notes out of the assets. But with that, as we have said, the City Bank had nothing to do.

In view of the statement of counsel, at the argument, to the circuit judge, that they did not contend that the contract was illegal, a disclaimer repeated to us, and in view of the possibility that the facts were found as they were with that agreement in view, we shall not consider that aspect of the case. It would not help the plaintiff. *McMullen* v. *Hoffman*, 174 U. S. 639. We are of opinion upon the facts that we have set forth that the courts below were right.

Judgment affirmed.

MR. JUSTICE WHITE and MR. JUSTICE MCKENNA dissent.